92-255

Supreme Court, U.S.
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No. 92-

In The

Supreme Court of the United States

October Term, 1992

PHILIPPINE GOODS, INC., TRANSAMERICA CORPORATION, and VICTORINO VILLACRUSIS,

Petitioners,

vs.

CONCEPCION S. WABOL and ELIAS S. WABOL,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

MARYBETH HERALD
Counsel of Record
for Petitioners
2121 San Diego Avenue
San Diego, California 92110
Telephone: (619) 297-9700

JOE HILL
P.O. Box 917
Saipan, MP 96950

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

QUESTION 1. Where Congress granted persons in the Commonwealth of the Northern Mariana Islands the rights guaranteed by the equal protection clause, with the exception of the right to be free of racial classifications in purchases and long-term leases of real property, does this exemption in and of itself violate the equal protection component of the due process clause?

QUESTION 2. Does the Ninth Circuit's decision in this case – holding that the equal protection of the laws is not fully applicable in the Northern Mariana Islands – conflict with the Supreme Court's decision in *Examining Board of Engineers v. Flores de Otero,* 426 U.S. 572 (1976), which held that equal protection of the laws – whether protected by the equal protection clause or the due process clause – is a fundamental right applicable to unincorporated territories?

QUESTION 3. Assuming that the Congress had the authority to extend the equal protection clause to the Northern Mariana Islands in a racially exclusionary manner through Covenant §805, does this power extend to immunizing from judicial scrutiny the Commonwealth's implementation of Section 805?

QUESTION 4. Does the Commonwealth's implementation of Covenant §805, through Article XII of the Northern Mariana Islands Constitution, exceed the scope of any equal protection exemption contained in §805?

QUESTIONS PRESENTED FOR REVIEW – Continued

QUESTION 5. Assuming that the Ninth Circuit correctly held that full equal protection guarantees do not apply in the Northern Mariana Islands, did it misapply its own test by finding that granting the right to own property free of racial discrimination in the Northern Mariana Islands would be impractical and anomalous where it based its determination on past and not current conditions?

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STATEMENT OF GROUNDS FOR JURISDICTION

The Ninth Circuit Court of Appeals entered its first opinion on February 20, 1990. Both appellants and appellees filed timely petitions for rehearing following the issuance of the first opinion. The Ninth Circuit subsequently filed an amended opinion on July 9, 1990, but did not act on the petitions for rehearing. The Ninth Circuit filed a second amended opinion on March 16, 1992, but did not act on the petitions for rehearing. On May 29, 1992, the Ninth Circuit denied the petitions for rehearing and rejected the suggestions for rehearing en banc. App. 70.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).[1]

STATEMENT UNDER RULE 29(b), (c)

Because the proceeding draws into question the constitutionality of the Covenant to Establish a Commonwealth of the Northern Mariana Islands In Political Union With the United States of America. Act of Mar. 24, 1976, Publ.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note, an Act of Congress and the United States or any department, office, agency, officer, or employee thereof is not a party, it is noted that 28 U.S.C. §2403(a)

[1] In compliance with United States Supreme Court Rule 29.1, it is noted that neither Philippine Goods nor Transamerica Corporation have parent or subsidiary corporations.

may be applicable. Because the proceeding draws into question the constitutionality of Article XII of the NMI Constitution and the Commonwealth, or any agency, officer, or employee thereof is not a party, it is noted that 28 U.S.C. §2403(b) may be applicable.

No court has certified to the United States Attorney General or the Commonwealth Attorney General that the constitutionality of the Covenant or Article XII of the NMI Constitution have been drawn into question.

Covenant §805, Article XII of the NMI Constitution and other Constitutional, Covenant, and statutory provisions have been set forth in the Appendix, pages 71-78.

STATEMENT OF THE CASE

A. Historical Background

This case involves the Commonwealth of the Northern Mariana Islands. The Northern Mariana Islands consist of fourteen small volcanic islands in Micronesia. Between 1947 and 1986, the United States governed the Northern Mariana Islands (NMI) under the United Nations Trusteeship Agreement for the Former Japanese Mandated Islands. *See* Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 3, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

Subsequent negotiations between the NMI and the United States culminated in a relationship defined by the Covenant to Establish a Commonwealth of the Northern Mariana Islands In Political Union With the United States of America. Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note. The United States now has a close and enduring political relationship

with the NMI. *See* Covenant §101 (NMI will be "in political union with and under the sovereignty of the United States.") The United States terminated the Trusteeship on November 3, 1986. Proclamation No. 5564, 51 Fed. Reg. 40, 399 (1986). The United Nations Security Council terminated the Trusteeship on December 22, 1990. S.C. Res. 683 U.N.SCOR, 45th Sess., 2972d mtg. at 29 (1990).

United States citizenship was extended to Trust Territory citizens and others living in the NMI when the United States terminated the Trusteeship in 1986. Covenant §301. In addition, all persons born on NMI soil now automatically become US citizens. Covenant §303.

Section 805 of the Covenant requires the NMI to restrict the alienation of "long term interests" in land to persons of Northern Marianas descent. The terms of §805 are patently racial. *See* App. at 1, 9; *Wabol v. Villacrusis*, 958 F.2d at 1451, 1455 (describing restriction as race-based). Section 501 of the Covenant extends various constitutional protections in the NMI, including the Fifth and Fourteenth Amendments, but purports to exclude Section 805 from the reach of the equal protection clause.

To implement §805, the NMI enacted Article XII of the NMI Constitution on January 9, 1978. App. 74-76. Article XII, §1 provided that the "acquisition of permanent and long term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent."

Section 3 of Article XII defined a "long term interest in land" as a "leasehold of more than forty years including renewal rights." The NMI then amended Article XII, §3 in 1985 to re-define a "long term interest" in land as a leasehold of more than fifty-five years and also permitted persons not of Northern Marianas descent to acquire condominium interests above the first floor. *See* NMI

Const., art. XII, §3 (as amended by 1985 Constitutional Convention Amendment 35.) App. 76.

Section 4 of Article XII defines a person of Northern Marianas descent. Section 5 defines corporations of Northern Marianas descent.[2] Section 6 of Article XII provides that "[a]ny transaction made in violation of Section 1 shall be "void ab initio."

B. Procedural History

Philippine Goods, Inc. is a corporation organized under the laws of the Northern Mariana Islands and with its principal place of business in the Northern Mariana Islands. It leased land in the Northern Mariana Islands in 1978. The lease is for a term of thirty years with an option to renew for twenty years. The option has never been exercised.

In 1985, Concepcion and Elias Wabol ("Wabol") filed suit in the Commonwealth Trial Court as owners of the leased land, to void the lease. They claimed that the lease was invalid under Article XII of the NMI Constitution, which limits the acquisition of long term interests in land in the NMI – defined as 40 years or less at that time – to persons of Northern Marianas descent. Philippine Goods did not come within Article XII's definition of "Northern Marianas descent," because only 50% of its stock was held by persons defined as of Northern Marianas descent and two of its three directors were not persons of Northern Marianas descent. App. 75.

The Commonwealth Trial Court granted Wabol summary judgment on the claim and held that Philippine

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[2] That section was also amended in 1985. *See* App. 76-77.

Goods' lease with Wabol violated Article XII. The Commonwealth Trial Court held that Covenant §805 and Article XII of the NMI Constitution, limiting the alienation of land in the NMI to persons of Northern Marianas descent, passed equal protection scrutiny. App. 53-66. Finding that the "equities strongly favor[ed]" Philippine Goods, the Commonwealth Trial Court held, however, that the lease was void only as to the term in excess of over forty years, and upheld it as a thirty year lease, with an option to renew for ten years. App. 66-68. Both parties agreed to a stipulated final judgment on February 18, 1986. All parties appealed the decision to the Appellate Division of the federal District Court for the Northern Mariana Islands, which had jurisdiction at the time pursuant to Covenant §402(c) and 48 U.S.C. §1694(b).

The Appellate Division also held that Covenant §805 and Article XII of the NMI Constitution did not violate the equal protection clause. App. 39-42. The Appellate Division held, however, that Phillipine Goods' lease with Wabol was void and incapable of reformation. App. 37. The Appellate Division then remanded the case to the trial court for a resolution of the equities in light of the voiding of the entire lease. App. 45-46.

On February 20, 1987, Philippine Goods and defendants Victorino Villacrusis and sublessee Transamerica Corporation (collectively referred to as "Phillipine Goods") appealed the decision to the Ninth Circuit Court of Appeals, which had jurisdiction over decisions of the Appellate Division of the federal District Court for the NMI, pursuant to federal law. 28 U.S.C. §1291; 48 U.S.C. §1694b(c). The Ninth Circuit heard oral arguments in May, 1988.

Before the Ninth Circuit issued a decision, the NMI Legislature passed a law creating an NMI Supreme Court and purporting to "pull back" to that court all decisions from NMI courts then pending in the United States Supreme Court, the Ninth Circuit Court of Appeals, and the Appellate Division of the federal District Court for the NMI. NMI Pub.L. No. 6-25, §3109.[3]

No cases from the NMI were pending in the United States Supreme Court on the date of passage of NMI Pub. L. No. 6-25. On February 20, 1990, the Ninth Circuit issued its opinion in this case and held that the NMI legislature had no power to divest a federal court of its jurisdiction over a case pending before it. App. at 11-17. The Ninth Circuit could find "nothing in the Covenant" that granted the NMI the authority "to amend or circumvent the express [federal law] provision that all appeals from the appellate division of the district court must be heard by [the Ninth Circuit] without limitation." App. at 15-16. It concluded that federal law invalidated that part of the NMI Judicial Reorganization Act that attempted to divest the Ninth Circuit of its jurisdiction over pending cases and to require them to be heard exclusively in the Commonwealth Supreme Court.[4]

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[3] Congress agreed in the Covenant to create a federal district court for the Northern Mariana Islands. To allow time for the formation of a local court system, Congress agreed that the federal district court would also serve as a trial and appellate court for the local NMI cases, in addition to having the jurisdiction of a district court of the United States. Covenant §402.

[4] The Ninth Circuit later held that the NMI legislature did have the power to divest the Appellate Division of the federal

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The Ninth Circuit also found that the decision of the Appellate Division of the District Court voiding the lease agreement, was a final, appealable order, although the Appellate Division's decision remanded the case to the trial court for a resolution of the equities. App. 6-11. The Ninth Circuit then affirmed the merits of the case on a basis not discussed in the lower court decisions – that the land alienation restriction was not subject to equal protection attack. App. 17-29.

Both appellant Philippine Goods and appellee Wabol filed petitions for rehearing with suggestions for rehearing *en banc*. Philippine Goods based its petition on the merits of the court's decision and did not object to the Ninth Circuit's jurisdictional ruling, while Wabol's petition for rehearing claimed that the Ninth Circuit lacked jurisdiction to issue the decision. On July 9, 1990, the Ninth Circuit issued an amended opinion, but did not act on the petitions for rehearing. App. 31. Almost two years later, on March 16, 1992, the Court issued another amendment to the opinion, changing a portion of footnote 19. App. 30. Over two months later, on May 29, 1992, the Ninth Circuit denied both petitions for rehearing and rejected the suggestions for rehearing *en banc*. App. 70.[5]

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District Court for the NMI of its jurisdiction over cases pending before it on the date of passage of Pub. L. No. 6-25. *Commonwealth v. Kawano*, 917 F.2d 379 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1116 (1991).

[5] Two other related appeals are pending in the Ninth Circuit. *Wabol v. Villacrusis*, Ninth Circuit No. 90-15101, is Philippine Goods' appeal from the NMI Supreme Court's

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REASONS FOR GRANTING THE WRIT

This petition for a writ of certiorari should be granted because this case involves questions of exceptional importance. The Ninth Circuit recognized that "the order validating the racially based land restrictions under constitutional equal protection doctrine clearly 'disposed of an unsettled issue of national significance' of critical importance to those inhabiting the territory and to those affected by any questions relating to the application of the Constitution to NMI." App. 9-10; *Wabol v. Villacrusis*, 958 F.2d at 1455.

When the Ninth Circuit resolved that issue in this case, the significance increased. The Ninth Circuit declared that pursuant to the Territorial Clause, the Congress could discriminate in the NMI on the basis of race, as long as the discrimination did not affect a fundamental right "in the international sense." The Ninth Circuit interpreted this category of fundamental rights not to include the right to own property. This broad interpretation of the Territorial clause authorizes Congress to enact racially discriminatory classifications among United States citizens in the commonwealths, possessions and territories of the United States. It allows Congress to delegate to the local governmental entity the enforcement of the racial restriction against political minorities. The Ninth Circuit's decision in this case is in conflict with decisions of the United States Supreme Court.

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assertion of jurisdiction over the appeal. *See* App. 11-12. *Wabol v. Villacrusis*, Ninth Circuit No. 90-15785, is Wabol's appeal from the grant of a stay to Philippine Goods by the Appellate Division of the federal District Court.

ARGUMENT

I

Congress Has No Power To Grant Equal Protection Guarantees To The Commonwealth Of The Northern Mariana Islands In A Racially Discriminatory Manner.

The Ninth Circuit asked the question whether "Congress exceed[ed] its powers under Article IV, section 3 by insulating section 805 from the reach of the equal protection clause?" App. at 21; *Wabol v. Villacrusis*, 958 F.2d at 1459. The Ninth Circuit's conclusion that Congress can do so ignores the fact that this exclusion is racially discriminatory and therefore itself in violation of the Constitution.

Here, Congress granted the full force of the equal protection clause to the NMI under Covenant §501. An exception to this protection is an exclusion that requires race discrimination. The heart of the equal protection clause is protected from racial discrimination. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). If a right is granted by Congress, it must be done in compliance with the Constitution, including compliance with equal protection guarantees, and specifically without racial discrimination. Congress cannot carve out exceptions for itself in granting rights where the exceptions in the grant run afoul of the equal protection clause of the U.S. Constitution. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment's equal protection component restricts Congressional action).

The territorial clause does not sanction this perverse exercise of power.[6] Congress' power to legislate under

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[6] The Territorial Clause provides in part that Congress has the power "to dispose of and make all needful Rules and

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the territorial clause, like every other legislative power, is subject to the constitutional restrictions contained in the Bill of Rights. When Congress acts, it must act consistently with the Constitution. As the Supreme Court observed:

> [t]he Constitution is filled with provisions that grant Congress or the States specific power to legislate in certain areas; these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.

Williams v. Rhodes, 393 U.S. 23, 29 (1968). *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no act of Congress can authorize a violation of the Constitution."); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (fifth amendment's equal protection component restricts Congressional action).

The Ninth Circuit previously considered whether Congress was required to grant a procedural right to people living in the NMI – the jury trial right in local law

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Regulations respecting the Territory or other property belonging to the United States." But it is questionable whether Congress had the power to legislate with regard to the NMI under the territorial clause because it was not considered a territory or possession at the time that the Covenant was enacted. *See, e.g., Holmes v. Director of Revenue and Taxation*, 827 F.2d 1243, 1245 (9th Cir. 1987) (NMI is not a possession of the United States but a United Nations Trust administered by the United States); *People of Saipan v. United States Department of Interior*, 502 F.2d 90, 95 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975) (" . . . the Trust Territory is not a territory or possession, because technically the United States is a trustee rather than a sovereign.").

cases. *CNMI v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244 (1984).

Contrary to the Ninth's Circuit's analysis, this case is not just an extension of the principles of *Atalig*. In *Atalig* the complaint was that Congress granted no procedural right at all to a jury trial in local law cases. It was not a case where Congress granted a right in a racially discriminatory manner. The Ninth Circuit's conclusion in *Atalig* that the jury trial right in local law cases was non fundamental was made in the context that the *denial* of the non fundamental right was to everyone, of every race, creed, or color, including all United States citizens living in the Northern Marianas. In this case, however, the extent of the *grant* of equal protection rights is determined by the suspect classification of race.

This is not a situation where Congress denies the right to alienate NMI property to everyone in the NMI, of every race, creed, or color. Congress may not be required to grant a right to jury trial, but once granted, it must be done in a race neutral manner, or it must meet the standards imposed by the equal protection clause for race classifications. If Congress has the choice of extending less than the full guarantees of the equal protection clause to the NMI, then any exemptions granted cannot be based on the suspect classification of race. The Ninth Circuit's decision erroneously gives Congress a broad power to extend a wide range of benefits and rights to United States territories and possessions in a race based manner.

II

The Ninth Circuit's Analysis Is Contrary To the Supreme Court's Holding in *Examining Board of Engineers v. Flores de Otero.*

In holding that the racial restriction on the acquisition of property in the NMI was immunized from any

equal protection scrutiny, the court posed the question as: "Is the right of equal access to long term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?" App. at 21.

The court explained that it phrased the question this way because:

> It is thus important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. *It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.*

App. 23 n.19 (emphasis added).

Thus by altering the question, the Ninth Circuit shifted the emphasis from the invidious discrimination to the specific activity sought to be conducted without race discrimination – the purchase of a long term interest in Commonwealth property. The Ninth Circuit's analysis ultimately results in the conclusion that no fundamental right to equal protection is implicated because the right to purchase land in the NMI is not fundamental enough. The question asked ignores the issue of racial discrimination, allowing the court to arrive at the unsettling conclusion that only an activity declared fundamental "in the international sense" is deserving of protection from racial discrimination in an unincorporated territory. App. 22.

Contrary to the Ninth Circuit's analysis, this case is not an extension of the principles of *Insular Cases* doctrine. The *Insular Cases* stand for the proposition that

application of only fundamental rights to unincorporated territories is required, but nonfundamental rights need not apply to these territories. *Downes v. Bidwell,* 182 U.S. 244 (1901); *DeLima v. Bidwell,* 182 U.S. 1 (1901).

In "unincorporated" territories, Congress is constrained only by those "principles which are the basis of all free government which cannot be with impunity transcended." *Downes v. Bidwell,* 182 U.S. at 292; *Dorr v. United States,* 195 U.S. 138 (1904); *Balzac v. Porto Rico,* 258 U.S. 298 (1922).

The question that the court should have asked is "whether the right to be free of invidious classifications based on race, ethnicity or alienage is a fundamental right applicable in the Commonwealth under the *Insular Cases* analysis?" The Supreme Court's opinion in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero,* 426 U.S. 572, 600 (1976) already answered this question "yes."

The issue in *Examining Board of Engineers v. Flores de Otero* involved Puerto Rico's enactment of a law allowing only United States citizens to practice privately as engineers. The Supreme Court examined the *Insular Cases* and held that the equal protection of the laws was a fundamental right applicable to the unincorporated territory of Puerto Rico. *Id.* at 600 ("It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.").[7]

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[7] The Supreme Court found it unnecessary to address the question whether it was the fifth or fourteenth amendment that required the result. *Id.* at 601. The equal protection clauses of the fifth and fourteenth amendments are co-extensive. *United States v. Paradise,* 480 U.S. 149, 166 n.16 (1987) (plurality opinion).

Finding the right to equal protection of the laws to be a fundamental right, the Supreme Court examined the law under traditional equal protection analysis and found that it did not, as a classification based on alienage, withstand strict scrutiny.

In contrast, if the United States Supreme Court had used the Ninth Circuit's approach in *Examining Board of Engineers v. Flores de Otero,* the Supreme Court would have asked: "Is the right of equal access to a private civil engineering practice in Puerto Rico, resident in the equal protection clause, a fundamental one?"

No doubt the answer would have been "no" because the question is phrased to remove the offensive nature of the restriction – whether it is a classification based on race or alienage – and place the emphasis instead on the importance of the underlying activity. But the Supreme Court has definitely answered the question whether equal protection is a concept coming within the *Insular* cases definition of a fundamental right. *Examining Board of Engineers v. Flores de Otero,* 426 U.S. at 600 ("The Court recognized the applicability of these guarantees [of the due process and equal protection clauses] as long ago as its decision in *Downes v. Bidwell,* [citation omitted] and *Balzac v. Porto Rico* [citation omitted]."). *See also Ralpho v. Bell,* 569 F.2d 607 (D.C.Cir. 1977) (protections of the due process clause of the fifth amendment apply to the actions of the United States in the Trust Territory of the Pacific Islands).

That conclusion cannot be altered by re-phrasing the question. Equal protection of the laws means more than the right to live free of racial discrimination in certain facets of our existence. The point of the equal protection clause is the value in treating all persons equally despite

their race, creed, or national origin. It applies regardless of the arbitrary value assigned by others to the underlying activity that the individual would like to conduct without discrimination.

Thus there may be no "fundamental right" to eat lunch at a particular lunch counter, but that does not mean that the government may prevent certain classes of people from being served based on race. *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 151-152 (1970). Similarly, there are many rights that are not deemed fundamental, but if granted, both Congress and the States would be required to dispense them without racial discrimination. *Compare, e.g., San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1 (1973) (education not a fundamental right) *with Brown v. Board of Education*, 347 U.S. 483 (1954) (equal protection clause prohibits states from maintaining racially segregated public schools) and *Bolling v. Sharpe*, 347 U.S. 497 (1954) (equal protection clause prohibits Congress from maintaining racially segregated schools in District of Columbia).

The Ninth Circuit's citation of *Califano v. Torres*, 435 U.S. 1 (1978), does not bolster its conclusion. In *Califano*, like *Atalig*, the question was whether Congress could deny social security benefits to *all* persons in Puerto Rico of every race, creed, or color.

A more important distinction is that the right to social security benefits has never been deemed fundamental. In contrast, in addition to the racial basis of the restriction, the right to own property is a basic and fundamental right. *See Shelly v. Kraemer*, 334 U.S. 1, 10 (1948) ("It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire,

enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.")[8]

III.

The Ninth Circuit's "Impractical and Anomalous" Test Creates a Free Zone for Racial Discrimination

The Ninth Circuit decided that affording the right to be free from racial discrimination in the ownership of real property in the NMI would be impractical and anomalous. App. 24; *See King v. Morton*, 520 F.2d 1140 (D.C.Cir. 1975) (using "impractical and anomalous" test in the context of the procedural right to a jury trial in American Samoa.)[9] Thus, it created a vacuum. Restrictions on the

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[8] The United Nations Trusteeship Agreement limits Congress' authority under the Territorial Clause. Contrary to the court's opinion, Philippine Goods did raise the issue of §805's compliance with the Trusteeship Agreement. *See Wabol v. Villacrusis*, 958 F.2d at 1459. Given the question of whether the territorial clause power applied, see *infra* note 6, Philippine Goods argued that the Trusteeship Agreement provided possibly the only source of Congressional power to enact the restriction. Philippine Goods argued that the Trusteeship Agreement did not give Congress authority for the enactment of §805, but rather showed that Congress had no right to enact the restriction because it discriminated among elements of the population. Opening Brief of Philippine Goods, *Wabol v. Villacrusis*, Ninth Circuit No. 87-1736, at pages 19-20 (quoting Article 6 of the Trusteeship Agreement.) *See also id, at* page 25; Reply Brief of Philippine Goods at page 2 n.1, 5, 13-14, 16.

[9] The Ninth Circuit adopted the "impractical and anomalous" test from *King v. Morton, supra*, which derived the test

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alienation of land to persons of Northern Marianas descent do not even have to meet a test of rationality. Once a right – including the fundamental right to own property – is pronounced "impractical and anomalous," Congress may enact racially based exemptions as it chooses, without scrutiny. Even benign race conscious measures enacted by Congress have been subjected to the more rigorous scrutiny that they must "serve important governmental objectives within the power of Congress" and the measures must be "substantially related to the achievement of those objectives." *Metro Broadcasting v. Federal Communications Commission*, 497 U.S. 547, 110 S.Ct. 2997, 3008-09 (1990), *reh. den.*, 111 L.Ed.2d 829 (1990).

The Ninth Circuit's exemption goes further than endorsement of benign race-conscious programs. It gives Congress the green light to discriminate on the basis of race in the commonwealth, territories, and possessions of the United States without scrutiny.[10]

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from a one-justice concurring opinion in *Reid v. Covert*, 354 US 1, 7t (1957) (Harlan, J., concurring).

[10] The extent of Congressional power to discriminate on racial lines may arise again as unincorporated territories and possessions of the United States negotiate or re-negotiate their status with the United States. Guam, for example, is seeking a commonwealth status with the United States. *See* Guam Draft Commonwealth Act, *reprinted in* 134 Cong. Rec. 3996 (1988).

The Ninth Circuit also noted that "absent the alienation restriction, the political union would not be possible." App. 25. If this were sufficient justification, such a boilerplate recitation in every agreement would be sufficient to waive constitutional guarantees to persons in unincorporated territories. *See Reid v. Covert*, 354 U.S. 1, 14 (1957) ("The concept that the Bill of Rights and other constitutional protections against arbitrary

(Continued on following page)

The result of that rule in this case demonstrates the fallacy of permitting unfettered discretion to discriminate. The Ninth Circuit endorsed the land alienation restriction in terms of the goal of protection of indigenous land rights, and ignored the operation of the actual restriction. An examination of the restriction would show that its goals are ill-served by its actual operation.

Covenant §805 provides that the goals of the racial restriction are to: (1) protect NMI persons from exploitation; (2) promote economic advancement and self-sufficiency; and (3) recognize the importance of ownership of land for the culture and traditions of the people of the NMI.

But even a cursory review of the §805 restriction reveals substantial flaws. Covenant §805 allows persons of Northern Marianas descent to acquire unlimited amounts of property from other persons of Northern Marianas descent without controls placed on their acquisition. No protection is available for persons who are dispossessed when their land is acquired. It will make little difference to the landless that a person of Northern Marianas ancestry made them landless and economically dependent. If this racial restriction is intended to prevent the people of the NMI from losing their lands or being exploited, it incorrectly assumes: (1) there is nothing wrong with persons losing their land to persons who

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government are inoperative when they become inconvenient or when expediency dictates otherwise is a dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our Government.").

happen to be of the correct NMI ancestry; or (2) there are no persons of NMI descent who would exploit persons of NMI descent. *See* Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards,* 9 Denver Journal of International Law and Policy 35, 61-62 (1980).

Moreover, if the culture of the NMI is truly dependent on the land, it is fanciful to suggest the culture will be disrupted by outright sales, but not by long term leases which remove the land from its owners' use for their lifetimes or longer. The restriction offers no protection from economic exploitation for those persons who enter into leases of 55 years or less.

These long-term leases displace persons of Northern Marianas descent from their land despite any effect on the culture. Article XII allows the loss of lands for 55 years without qualification, and permanently if the purchaser is of Northern Marianas descent. It offers no protection for any culture that is tied to the land, except on the chance that the culture will resurge in 40 or 55 years. In short, the restriction focuses exclusively on a racial target, although the actual problem that it attempts to address involves a number of complex issues and interactions that cross racial lines.

IV.

The Ninth Circuit's Decision Endorses the Enforcement of a Racial Restriction By a Political Majority Against a Political Minority.

The Ninth Circuit's decision allows Congress to delegate enforcement of Covenant §805's racial restriction to

the NMI. The Ninth Circuit used its conclusion that Covenant §805 was valid as a bootstrap to endorse - without review – Article XII of the NMI Constitution. The Ninth Circuit essentially allowed Article XII, as the vehicle for implementing §805, to escape without any meaningful scrutiny. *See* App. 27 ("Accordingly, Congress acted within its power in enacting sections 501(b) and 805 of the Covenant, and Article XII is not subject to equal protection attack.")

Covenant §805, even if accepted as an exemption from the restraints of equal protection review, limits the breadth of Article XII. The fourteenth Amendment of the United States Constitution is fully applicable to the NMI, but for the limited exemption granted by §501(b) of the Covenant, which includes §805. Article XII must be independently evaluated to determine if it fits within the scope of Covenant §805. Moreover, delegation of the enforcement of the restriction to the favored majority calls for heightened scrutiny.

Although acknowledging that Article XII can be a tool for overreaching, the Ninth Circuit relegated Philippine Goods to the NMI political arena for any relief. *See* App. 29 n.23. But Philippine Goods is not only a member of the non-favored racial group for the purposes of Article XII, but also in the political arena. The NMI Legislature is wholly composed of persons of Northern Marianas descent. The three full time justices of the newly created NMI Supreme Court, and the Governor, are persons of Northern Marianas descent. This is a situation where a majority is given the power to enforce a racial classification against a minority. In these circumstances, Article XII should be subject to a more searching review. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1989)

(where five of nine city council seats were held by blacks and population was 50% black, " . . . concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against the application of heightened judicial scrutiny" of affirmative action program.)

There is an inherent hazard when persons of the favored classification control implementation of that classification in a small society. *Id.* at 522-23 ("[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States," because of the "heightened danger of oppression from political factions in small, rather than large, political units.") (Scalia, J. concurring).

The Ninth Circuit has itself acknowledged in other cases that the small and family centered structure of NMI society imposes some limitations on the traditional justice system. In upholding the NMI's exemption from the procedural requirement of jury trials in local criminal cases, the Ninth Circuit recently emphasized the importance of the exemption, explaining that the limitation found justification in the "fear that the small, closely-knit population in the Northern Mariana Islands might lead to acquittals of guilty persons in criminal cases." *Commonwealth v. Magofna*, 919 F.2d 103, 106 (9th Cir. 1990) (quoting Comm. On Personal Rights and Natural Resources, Rep. No. 4 (1976)). *See also* Liebowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* (1989) at 526 (the extended family is still the basic social and political block of NMI society).

The fear is more than theoretical. In 1989, the NMI created its own Supreme Court. This new court recently

fashioned a novel "resulting trust" doctrine that voids even fifty-five years leases taken by non-Northern Marianas descent persons. In *Aldan-Pierce v. Mafnas*, No. 89-003, 1991 WL 165048 (NMI Sup.Ct. July 5, 1991)[11] a person of Northern Marianas descent took fee title with funds advanced by persons not of Northern Marianas descent. In turn, she granted them a 55 year leasehold interest in the land, the maximum permitted under NMI law. Although 55 years leases are valid under Article XII, the NMI Supreme Court created a fictional title in the non-Northern Marianas descent persons. This title, the NMI Supreme Court found, was involuntarily owned in a "resulting trust" by the person or persons who advanced funds, in whole or in part, that the person of

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[11] *Aldan-Pierce v. Mafnas* is now on appeal to the Ninth Circuit Court of Appeals pursuant to Covenant §403(a). *Aldan-Pierce v. Mafnas*, Ninth Circuit No. 91-16240 (appeal filed July 30, 1991).

Mafnas, the original land owner challenging the land transaction, had lost his case in the Commonwealth Trial Court, as well as his appeal in the appellate division of the federal district court for the NMI. He appealed to the Ninth Circuit, but after passage of the NMI Judicial Reorganization Act, chose to dismiss the Ninth Circuit appeal, and pursue the appeal in the NMI Supreme Court. Because the *Aldan-Pierce* appeal was pending in the Ninth Circuit at the time that the NMI Judicial Reorganization Act was passed, the NMI Supreme Court attempted to "pull back" the appeal to its court from the Ninth Circuit. NMI Pub.L. No. 6-25 §3109. The Ninth Circuit, however, held that the NMI legislature had no authority to "pull back" appeals pending in the Ninth Circuit. App. 16-17; *Wabol v. Villacrusis*, 958 F.2d at 1457-58. The *Aldan-Pierce v. Mafnas* case is now on appeal from the decision of the NMI Supreme Court and the NMI Supreme Court's jurisdiction is the threshold issue.

Northern Marianas descent used to buy the land. The resulting trust arises despite express agreements and title documents to the contrary.

Article XII's design deliberately reflected a bright-line test. *Briefing Papers for the Delegates to the Northern Mariana Constitutional Convention: Briefing Paper No. 12,* Restrictions on Land Alienation 48 (1976). The bottom line of the NMI Supreme Court's new doctrine, however, is to turn the bright-line test of Article XII into a murky Gestalt test administered by the NMI judiciary on a case by case basis. Record land title has no value in the NMI because it is the unrecorded relationships of the parties that must be examined under the NMI Supreme Court's new test. Having erased the bright-line test, discretion in application of the new test to administered by the favored group against the non favored group.

In a subsequent case, a "special Judge," not a full time justice of the NMI Supreme Court criticized the NMI Supreme Court's opinion in *Aldan-Pierce v. Mafnas.* In a opinion dissenting from the NMI Supreme Court's application of its test in another case involving Article XII, Special Judge King stated that the court was voiding agreements that did not violate the plain terms of Article XII. He noted the NMI Supreme Court's use of Article XII as a tool to manipulate cases to reach a result that the NMI Supreme Court wanted to reach, rather than one warranted by the language of Article XII:

> Moreover, nothing in the [NMI] Constitution or the constitutional history suggests that this Court is designated to ferret out and punish attempts by non-NMDs and NMDs to enter into transactions which we may perceive somehow as contrary to the spirit of article XII even

> though not actually prohibited by the language of the article.
>
> Specifically, nothing in these sources of law hints of a constitutional directive that we should expand or modify other concepts, such as the resulting trust doctrine, and superimpose these altered doctrines over the article XII restrictions in order to outlaw arrangements which are not directly prohibited by article XII but which we believe should have been prohibited.[12]

Ferreira v. Borja, No. 90-047, 1992 WL 62894 (NMI Sup.Ct. Feb. 18, 1992).

But as important as the actual test adopted by the NMI Supreme Court in *Aldan-Pierce v. Mafnas* is the process that went into forming it. The mother-in-law and father-in-law of one of the Justices sitting on the NMI Supreme Court in the *Aldan-Pierce v. Mafnas* case filed lawsuits challenging apparently similar transactions, including one in which a $100 million dollar hotel had been built on the property during the seven year period since the mother-in-law's transaction. In these cases, the in-laws sought return of their land, with no obligation to

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[12] His criticism included that the NMI Supreme Court's use of the resulting trust doctrine in this context "rips the resulting trust doctrine from its moorings," "is inherently suspect," and "is a perverse misapplication of the doctrine." *Ferreira v. Borja*, NMI Supreme Court No. 90-047, at 19 and 20 (King, J., dissenting). Moreover, he noted that "this novel effort has forced the Court to ignore or modify key aspects of the doctrine, and thereby to transmogrify the resulting trust doctrine itself." *Id.* at 19. He pointed out that the court had committed "errors of logic and analysis, including circular reasoning and unjustified adoption of legal fictions . . . " *Id.* at 23.

refund the purchase price or pay for the improvements on the land. *See Dela-Cruz v. Hotel Nikko Saipan, Inc. et al,* Commonwealth Superior Court, Civil Action 91-259, filed March 26, 1991; *Francisco Chong v. Kamoshita Marianas Ent. Inc.*, Commonwealth Superior Court, Civil Action 91-264, filed March 28, 1991. The lawsuit was filed on their behalf after *Aldan-Pierce v. Mafnas* has been submitted to the NMI Supreme Court, but before issuance of the decision. Aldan-Pierce filed a motion to disqualify Justice Villagomez, but he claimed that his disqualification was not required until all the facts of his in-laws' cases had been litigated. Order dated June 20, 1991, *Aldan-Pierce v. Mafnas,* NMI Supreme Court No. 89-003. This is contrary to the rule announced by the Supreme Court in *Aetna Life Insurance v. LaVoie,* 475 U.S. 813, 835, 106 S.Ct. 1580, 1587 (1986) (due process clause mandates that judge be disqualified in a case in which an average judge might be tempted "not to hold the balance nice, clear and true").

Justice Villagomez participated in the *Aldan-Pierce v. Mafnas* decision. On the same day as the issuance of the decision in *Aldan-Pierce v. Mafnas,* which significantly enhanced the likelihood of the success of his in-laws' lawsuits, and settlement value, the Justice disqualified himself from several other cases involving Article XII "because his mother-in-law and father-in-law have filed cases involving Article XII of the NMI Constitution." *Wilfred S. Reyes v. William H. Millard, et al.*, NMI Supreme Court Appeal No. 90-058, Order dated July 5, 1991; *Vincent S. Cepeda v. Robert A. Hefner et al.*, NMI Supreme Court Appeal No. 90-057, Order dated July 5, 1991. The die had been cast, however, and application of the precedent now affects other litigants' cases.

The point that the Ninth Circuit overlooked is that the NMI should not be able to insulate their actions from scrutiny simply by proclaiming that they undertook them in the name of §805. Thus, assuming §805 is not unconstitutional, the NMI's implementation of §805 should be subjected to some scrutiny to determine whether it fits within §805's exemption window. Moreover, the scrutiny should be rigorous, given the NMI is enforcing the racial restriction against a political minority.

The Ninth Circuit ignored these issues. Yet, several actions of the NMI call into question Article XII's fit within the exemption window of §805. For example, the NMI has implemented Section 805's goals through a floating "long term interest" rate. In 1978, a "long term interest" in land was defined as a leasehold over 40 years, and deemed to be in contravention of §805's goals. In 1985, a "long term interest" was re-defined by the NMI as a leasehold longer than 55 years, and only then in contravention of §805's goals. The result is the same lease at issue here, if entered into in 1986, rather than 1978, would be held valid under Article XII and deemed in compliance with §805's goals. As a fifty year leasehold, it would have been deemed to fit well within the goals of §805. But the NMI's amendment re-defining "long term interests in land" for the purposes of §805 was not retroactive. *See* Article XII, §3, as amended. As a result, Philippine Goods and its sublessee Transamerica will lose their business on their leased land.

Finally, Covenant §805 does not endorse, mention, or authorize a "void ab initio" penalty. But Article XII, as implemented by the NMI flatly and without qualification,

voids all transactions that do not meet the standards of Article XII, as those standards are defined by the NMI, no matter what the fault, impact, nature of the deviation, or other circumstances. Leases are voided that are no different from leases signed a few years later that are now deemed consistent with §805's goals.

V.

The Ninth Circuit Misapplied Its Own Test In Finding that the Right to Own Property Without Racial Discrimination In the NMI Would be "Impractical and Anomalous."

Although labeling the right to own land free of racial restrictions "impractical and anomalous" in view of the "local culture and values" of the NMI, the Ninth Circuit did not examine the contemporary culture and values of the NMI, nor did it question adherence to the underlying principles of §805 in other facets of NMI government policies. In contrast, in *King v. Morton,* from which the "impractical and anomalous test" was adopted, the court said that the question could only be answered by considering "solid evidence of actual and existing conditions" and remanded to allow such a factual record to be developed. *King v. Morton,* 520 F.2d at 1148.

In this case, the Ninth Circuit – after announcing adoption of the test – relied upon information about the NMI in the 1970's, without any examination of whether those conditions still exist. Current conditions in the NMI demonstrate the fallacy of a simplistic racial solution to a complex problem. Economic development in the NMI boomed during the 1980's, with hotel development and tourist arrivals dramatically increasing, all with the approval and support of the NMI government. CNMI

Office of Planning & Budget, *Economic Development Strategy*, 46-60 (1990) ("Economic Development Strategy"). Tinian, one of the smaller islands in the NMI, voted to allow casino gambling, and the establishment of five casino gambling resorts are now authorized. Tinian Local Initiative 1 (1989). The NMI also developed a garment industry, and over 20 plants now operate there. *Economic Development Strategy, supra* at 61.

The NMI also controls its own immigration under the Covenant. Covenant §503. The number of resident alien workers has grown tenfold in the last ten years, as alien workers from surrounding Asian countries legally enter and come to work in the NMI. U.S. Department of Commerce, Bureau of the Census, 1990 Census of Population and Housing, Commonwealth of the Northern Mariana Islands (March, 1992) at 18. In fact, the 1990 Census shows that the NMI population has more than doubled since 1980, and politically disenfranchised alien workers now compose at least 52% of the NMI's total population of 43,345. *Id.* at 16.

With hotel and resort development, casino gambling, and garment factories, it is now difficult to make a case that allowing the free alienation of land – as opposed to 55 year leaseholds – will disrupt the culture and traditions of the NMI. For better or for worse, during the last 12 years, the NMI itself has opted to enter the global economy.

CONCLUSION

The issues raised in this case call into question the powers of Congress to enact racial classifications affecting the ownership of property in the commonwealths,

possessions, and territories under the sovereignty of the United States. The issues are of importance to the people living there because the Ninth Circuit has endorsed Congressional authority to discriminate among them based on race. The issues are of importance to the people of the United States generally because the Ninth Circuit has limited the safeguards of the equal protection clause.

Petitioners pray that the Court grant certiorari for review of this case.

Dated this 4th day of August, 1992.

Respectfully Submitted,

MARYBETH HERALD
BERGSMA & HERALD

JOE HILL
HILL & SAWHNEY

Attorneys for Petitioners

Concepcion S. Wabol, et al.,
Plaintiffs-Appellees

v.

Victorino Villacrusis, et al.,
Defendants-Appellants.

Ninth Circuit No. 87-1736

United States Court of Appeals
for the Ninth Circuit

Argued and Submitted,
San Francisco, California
May 11, 1988

Second Amended Opinion Filed March 16, 1992

JUDGES: Before: Cecil F. Poole, Charles Wiggins and Melvin Brunetti, Circuit Judges.

AMENDED OPINION

POOLE, Circuit Judge:

In *Commonwealth of Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir.), *cert. denied*, 467 U.S. 1244, 82 L. Ed. 2d 826, 104 S. Ct. 3518 (1984), we held that the Sixth Amendment right to a trial by jury does not apply in the Commonwealth of the Northern Mariana Islands (NMI or Commonwealth). This case requires us to determine whether the constitutional guarantee of equal protection of the laws limits the ability of the United States and the Commonwealth to impose race-based restrictions on the acquisition of permanent and long term interests in Commonwealth land. Plaintiffs-appellees Concepcion S. and Elias S. Wabol (collectively Wabol) brought this action in the Commonwealth Trial Court to void their lease agreement with defendants-appellants Victorino Vilacrusis and Philippine Goods, Inc. (collectively PGI). Wabol alleged

the agreement violated Article XII of the NMI Constitution which provides that the sale of a freehold or a leasehold exceeding forty years, including renewal rights, to a person not of Northern Mariana Islands descent, is void ab initio. PGI defended on the ground that Article XII violates the equal protection clause of the United States Constitution. The trial court upheld the restriction but reformed the lease on equitable grounds. The Appellate division of the District Court for the Northern Mariana Islands reversed, also upholding the restriction, but concluding that section 6 of Article XII precludes reformation of a prohibited lease. The district court remanded to the trial court "to determine the terms and conditions of any obligations which may have arisen in quasi contract or as a result of a periodic tenancy" and to account for the improvements erected on the land by PGI. PGI timely appealed.

We conclude that, despite the remand, we have jurisdiction to consider this appeal. In addition, we conclude that the Commonwealth Judicial Reorganization Act of 1989, NMI Public Law No. 6-25, enacted while this appeal was pending, does not divest this court of jurisdiction to decide the appeal. On the merits, we hold that the right to acquire permanent or long-term interests in NMI real estate is not one protected by the United States Constitution. We further hold that Article XII precludes reformation of a lease which violates its provisions. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

A. Facts

In 1978, defendant Filomenia Wabol Muna and PGI entered into an agreement, approved by Wabol, to lease a

parcel of NMI property for a 30 year term with an unconditional option in lessee PGI to renew for 20 additional years. Thereafter Wabol obtained full ownership of the premises in a partition action. Muna, however, continued to collect rents, and Wabol brought this suit seeking, *inter alia*, a judgment voiding the lease for violation of Article XII.

B. Article XII of the NMI Constitution and the Covenant

Article XII of the NMI Constitution implements section 805 of the Covenant to Establish a Commonwealth in Political Union With the United States of America, *reprinted as amended* in 48 U.S.C.A. §1681 note (West 1987) (Covenant). Section 805 provides that, notwithstanding federal law, the Commonwealth government shall regulate the alienation of local land to restrict the acquisition of long-term interests to persons of Northern Mariana Islands descent.[1] The avowed motive of the drafters was

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[1] Covenant section 805 provides:

> Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency:
>
> (a) will until twenty-five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long-

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"to protect [the people] against exploitation and to promote their economic advancement and self-sufficiency" and to preserve the islanders' culture and traditions, which are uniquely tied to the land. Accordingly, Article XII, section I provides that

> [t]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 3 of that Article defines the restricted interests:

> The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.[2]

Section 4 defines a person of Northern Marianas descent as one

> who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas decent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be

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term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and

(b) may regulate the extent to which a person may own or hold land which is now public land.

[2] This section was amended in 1985 to define a long-term leasehold as one of more than fifty-five years. The amendment is nonretroactive.

> considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.[3]

Sections 6 of Article XII provides in pertinent part that "any transaction made in violation of Section 1 shall be void ab initio."

C. Proceedings below

On Wabol's motion for summary judgment, the trial court ruled that: (1) the lease violated Article XII, section 1; (2) Article XII did not violate the equal protection clause; but (3) in light of Wabol's "waiver, laches and estoppel" in allowing PGI to pay rent for almost seven years and construct extensive improvements on the property, the lease was valid for the forty year allowable term. In its equal protection analysis, the court applied a

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[3] Section 5 defines corporate persons eligible to purchase permanent and long-term interests:

> A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by Section 4.

Section 5 was amended in 1985 to raise the fifty-one percent provisions to one-hundred percent, and in other particulars not relevant here. It is undisputed that PGI is an ineligible corporation.

relaxed rational basis standard of review, drawing an analogy to decisions dealing with classifications favoring American Indians. The parties stipulated to judgment and appealed. The appellate division of the district court agreed that the lease was invalid, also applying minimal equal protection scrutiny. However, the district court rejected the trial court's implicit conclusion that section 6 permitted reformation of a nonconforming lease, and reversed. The case was remanded to the trial court for a determination of (1) the value of the improvements and (2) the extent of any rights arising in quasi contract or as the result of a periodic tenancy. This appeal timely followed.

II. JURISDICTION

Preliminarily, we must determine whether the district court's remand order deprives us of jurisdiction over this appeal.[4] In addition, we must determine whether NMI Public Law 6-25 divests this court of jurisdiction over the appeal. We determine our jurisdiction *de novo*. *Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

A. Finality of the Remand Order

It is axiomatic that our jurisdiction extends only to "final" judgments of the district court. However, we measure the finality of decisions of the appellate divisions of the district courts for Guam and the Commonwealth by analogy to the standard the Supreme Court applies in reviewing state court judgments under 28 U.S.C. §1257.

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[4] A motions panel ordered PGI to show cause why the appeal should not be dismissed for want of a final judgment. PGI responded and the matter was referred to this panel for determination preliminary to the merits.

See Guam v. Kingsbury, 649 F.2d 740, 742 (9th Cir. 1980), *cert. denied*, 454 U.S. 895, 70 L. Ed. 2d 210, 102 S. Ct. 392 (1981).

Clearly, the decision at hand is "not final in the strict sense of a decree that leaves nothing further to be addressed by the [local] courts." *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 277, 64 L. Ed. 2d 284, 100 S. Ct. 1673 (1980). However, the Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 43 L. Ed. 2d 328, 95 S. Ct. 1029 (1975), described four categories of judgments with "sufficient characteristics of finality to warrant an assertion of . . . appellate jurisdiction." *Alvez*, 446 U.S. at 277. *See Cox Broadcasting*, 420 U.S. at 477-87. We recently summarized the exceptions:

> The [Supreme] Court will review federal issues in state court cases even though further proceedings are pending when: (1) the federal issue is conclusive or the outcome is preordained; (2) the federal issue will survive the further proceedings and require adjudication; (3) the federal issue has been fully decided and review after remand might be precluded; (4) the federal issue has been fully decided and the case might be decided on nonfederal grounds below, but determination of the federal issue would immediately resolve the case and delaying review would erode federal policy.

Kiaaina v. Jackson, 851 F.2d 287, 289 (9th Cir. 1988) (per curiam) (*citing Cox Broadcasting*, 420 U.S. at 479-83).

In applying the exceptions, we have frequently observed that the analogy is imprecise. *See Kiaaian, Id.; Guam v. Manibusan*, 729 F.2d 1236, 1238 (9th Cir. 1984); *Guam v. Quinata*, 704 F.2d 1085, 1086 (9th Cir. 1983); *see*

also Kingsbury, 649 F.2d at 746-48 (Poole, J., dissenting). *Cox Broadcasting* accommodates the competing concerns of judicial efficiency, federalism and comity presented by Congress' grant of power under section 1257 to review questions of federal law decided by state courts. *Kiaaina*, 851 F.2d at 289. But these concerns are vastly different in the present context because our jurisdiction under 48 U.S.C. §1694b(c) is plenary, extending to questions of local as well as federal law, and mandatory.[5] Accordingly, in *Kiaaina* we adjusted the exceptions to more accurately reflect the posture in which we receive cases under section 1694b(c). Thus "[f]or purposes of the Cox analysis . . . all issues are federal." *Id.*

Kiaaina further observed that, under this tightened analogy, "the first two *Cox* exceptions have little relevance in determining the finality of decisions of the Guam Appellate Division." *Id.* It is the second *Cox* exception – cases in which the federal issue "will survive and require decision regardless of the outcome of future state court proceedings," *Cox Broadcasting*, 420 U.S. at 480 – upon which PGI principally relies here.

Despite *Kiaaina's* observation that this exception has "little relevance" to our finality analysis, that court recognized the need to "review decisions from the Appellate Division of the district court of Guam [or, analogously,

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[5] Thus, judicial efficiency, the primary rationale behind the final judgment rule, takes on added dimension. The pendency of *any* question remaining for decision presents the spectre of piecemeal review. And federalism and comity considerations are less relevant where, as here, both Congress and the Commonwealth have assigned federal courts a substantial role in developing Commonwealth law.

the Appellate Division of the district court of the Northern Mariana Islands] when further proceedings are pending . . . if policy issues involved are of such importance as to demand immediate review, or declining to entertain the appeal would preclude further review." 851 F.2d at 290. As the court itself recognized, this test "parallels the 'practical finality' test applied by the Supreme Court in determining its appellate jurisdiction over federal cases." *Id.* at 290 n.5 (*citing Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53, 13 L. Ed. 2d 199, 85 S. Ct. 308 (1964)).

The 'practical finality' test is satisfied when the following four factors are met: "(1) the case was a ' marginally final order,' (2) 'disposed of an unsettled issue of national significance,' (3) review 'implemented the same policy Congress sought to promote in §1292(b),' and (4) the finality issue was not presented to the Supreme Court until argument on the merits, thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue." *In re Subpoena Served on Cal. Public Utilities Comm'n*, 813 F.2d 1473, 1480 (9th Cir. 1987) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978)).

We believe this case possesses sufficient characteristics of finality under this test to command our immediate attention. The challenged order is 'marginally final' because the pending proceedings have little substance and will not affect the potentially dispositive and obviously central issue – the validity under the federal constitution of the land alienation restrictions set forth in the Commonwealth constitution. Moreover, the order validating the racially based land restrictions under constitutional equal protection doctrine clearly "disposed of an unsettled issue of national significance" of critical importance to those inhabiting the territory and to those

affected by any questions relating to the application of the constitution to NMI. Review of the merits in this case is consistent with the policies underlying §1292(b) in that immediate review is fundamental to the further conduct of the case. *See Gillespie,* 379 U.S. at 154. If we find the restriction invalid, then the remand becomes unnecessary. If we uphold the restriction, there is little more than an accounting remaining for adjudication. Though the remaining issues could eventually ascend to this court, this alone should not prevent our adjudication of important and potentially dispositive questions which have been fully briefed and argued.[6] Such a result would disserve the cause of judicial economy and therefore frustrate the very purpose of the final judgment rule.[7]

Moreover, the Supreme Court, in accepting review of analogous appeals, has often pointed to the divisibility of the issue presented from the issues withheld. *See First English Evan. Luth. Ch. v. Los Angeles Cty,* 482 U.S. 304, 309-10 n.3, 107 S.Ct. 2378, 2383 n.3, 96 L.Ed.2d 250 (1987) (whether county had taken petitioner's property, requiring just compensation, was distinct from the question whether flood control district was liable for damage to that property); *NAACP v. Claiborne Hardware Co.* 458 U.S. 886, 907 n.42, 73 L. Ed. 2d 1215, 102 S. Ct. 3409, 3422 n.42 (1982) (pending recomputation of damages distinct from the federal liability issue); *Alvez,* 446 U.S. at 279 (existence of right of consortium under general maritime law

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[6] It is entirely possible that, if this court upholds the challenged restrictions, the issues of local law remaining would never be reviewable by this court. *See* NMI Public Law No. 6-25 and discussion at II.B, *infra.*

[7] Significantly, our exercise of jurisdiction will not interfere with the course of the trial. The trial court purported to issue a final judgment. *See Quinata,* 704 F.2d at 1087.

unaffected by pending questions of negligence and unseaworthiness); *Brady v. Maryland*, 373 U.S. 83, 85 n.1, 10 L. Ed. 2d 215, 83 S. Ct. 1194, 1195 n.1 (1963) (judgment sufficiently final because the question raised was " 'independent of, and unaffected by' what may transpire" on remand) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 126, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945)). Because the questions pending for initial decision are insubstantial and cannot affect the questions presented for review, we hold that the judgment is sufficiently final under *Kiaaina* to permit our review.

B. Effect of Public Law No. 6-25

On May 2, 1989, almost one year after this appeal had been fully briefed, argued and submitted for disposition, the Commonwealth legislature enacted the Commonwealth Judicial Reorganization Act of 1989, Public Law No. 6-25, Section 3109 (the "Act"). The Act establishes a local appellate court, the NMI Supreme Court, and purports to divest all federal courts of jurisdiction over appeals, including those pending when the Act was passed, which involve cases originating in the local trial courts. NMI P.L. No. 6-25, §3109(b). The newly established NMI Supreme Court has recently upheld the provisions divesting this court of jurisdiction over this appeal. *See Wabol v. Villacrusis*, No. 89-005 (Sup.Ct. NMI, Dec. 11, 1989). If we decide that the Act does not operate to divest this court of jurisdiction over this appeal or, conversely, to vest such jurisdiction in the NMI Supreme Court, we need not give full faith and credit to the NMI court's judgment. *See Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n*, 455 U.S. 691, 71 L. Ed. 2d 558, 102 S. Ct. 1357 (1982); *Nevada v. Hall*, 440 U.S. 410, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979), *reh. den.*, 441 U.S. 917 (holding that no full faith and credit is

warranted for decision rendered by court without jurisdiction). We must therefore independently determine whether the Act operates to divest this court of jurisdiction over this appeal.[8] We hold that it does not.

The Covenant, as implemented by Public Law No. 95-157, 91 Stat. 1266 (Nov. 8, 1977), established a district court for the District of NMI, which maintains original federal jurisdiction over cases involving federal questions, diversity, or bankruptcy. 48 U.S.C. §1694a(a). The district court was further authorized to exercise original jurisdiction over cases involving issues of local law which NMI courts were not empowered by the NMI constitution or laws to decide. 48 U.S.C. §1694a(b). In this latter capacity only, the district court is considered to be a local NMI court. *Id.* Otherwise, it is a federal court. 48 U.S.C. §1694c(b).

The Covenant further provides that, until NMI established its own appellate court, the NMI legislature could authorize the district court to have appellate jurisdiction over cases from the NMI trial courts, providing that, at a minimum, the district court would have appellate jurisdiction over such cases when federal issues were involved. 48 U.S.C. §1694b(a).[9] Until the Act was passed

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[8] In any event, if the NMI Supreme Court's jurisdictional decision in *Wabol* were to be given full faith and credit, this court would have appellate jurisdiction under section 403(a) of the Covenant (48 U.S.C. §1694c(a)) to reconsider the NMI court's holding, which directly pertains to an issue of federal law (the validity of the Act's provisions under the Covenant). *See, infra*, note 10.

[9] As originally enacted in 91 Stat. 1266, §1694b(a) authorized the NMI legislature to grant appellate jurisdiction to the district court. This court, in *Sablan v. Santos*, 634 F.2d 1153 (9th Cir. 1980), interpreted this section to allow NMI to determine

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in May, 1989, NMI had no appellate court of its own, and all appeals from the local trial courts, including this one, were heard by the Appellate Division of the district court. *See* NMI P.L. No. 1-5 (1978); *Gioda v. Saipan Stevedoring Co., Inc.*, 855 F.2d 625 (9th Cir. 1988). This court has jurisdiction over all appeals from the appellate division pursuant to section 403(b) of the Covenant, originally codified at 48 U.S.C. §1694c(b), which provides that those sections of Title 28 of the U.S. Code applicable to Guam shall be applied to NMI. 28 U.S.C. §1291 provides for Ninth Circuit jurisdiction over all appeals from the appellate division of the district court of Guam. Congress explicitly clarified section 403(b) by amending the implementing legislation in 1984 to provide that this court "shall have jurisdiction of appeals from all final decisions of the appellate division of the district court" of NMI. 48 U.S.C. §1694b(c).

The Act established a local appellate court, revoking entirely the appellate jurisdiction of the district court. NMI P.L. No. 6-25, § 1. The Covenant clearly entitles the NMI legislature to determine which court(s) will hear direct appeals from its local trial courts. 48 U.S.C. § 1694b(a); *Gioda*, 855 F.2d at 628. The Covenant does, however, limit NMI's authority to restrict the jurisdiction

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the appellate jurisdiction of the district court over all cases involving issues of local law, including those originating in the district court. In 1984, the U.S. Congress clarified §1694b(a) with an amendment permitting NMI to determine only the appellate jurisdiction of the district court over cases in the local trial courts so that NMI could not determine the courts to which cases in the federal district court could be appealed. *See* Public Law No. 98-454, 98 Stat. 1744 (Oct. 5, 1984); *Gioda v. Saipan Stevedoring Co. Inc.*, 855 F.2d 625, 628 (9th Cir. 1988).

of courts empowered to hear appeals from federal courts or involving issues of federal law.[10]

The Act expressly states that all federal courts, including this court and the United States Supreme Court, are divested of jurisdiction over all appeals from cases originating in the local trial courts that were pending when the Act was passed.[11] NMI P.L. No. 6-25, §3109(b). The Act requires that all such appeals shall be heard exclusively by the new NMI Supreme Court. *Id.* Since this appeal was still "pending" in this court for the purposes of the Act, these provisions would clearly apply to divest this court of jurisdiction over this appeal unless the NMI legislature exceeded its authority and the provisions are invalid.

The NMI legislature's authority to establish a local appellate court is governed by section 402 of the

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[10] Section 403(a) of the Covenant, codified at 48 U.S.C. §1694c(a), mandates that, for 15 years after the establishment of a local appellate court, this court would maintain jurisdiction over appeals from such court involving federal law unless such cases are reviewable in the district court appellate division. We hold this section to be inapplicable to appeals, such as this one, which were taken from the appellate division of the district court, and not from the local appellate court newly established by the Act. *See Camacho v. Civil Service Commission*, 666 F.2d 1257, 1261 (9th Cir. 1982). We therefore find it unnecessary at this time to rule on the validity of the Act's attempt to measure the 15 year period from the passage of NMI P.L. No. 1-5, which implemented the Covenant section relating to the appellate jurisdiction of the district court, rather than from the passage of the 1989 Act, which first established a local appellate court.

[11] The Act defines 'pending' appeals as those appeals for which the final mandate of the court hearing them has not issued.

Covenant, which was ratified by the U.S. Congress and codified at 48 U.S.C. §1694b(a). Although section 402 clearly authorizes the NMI to bestow or withdraw appellate jurisdiction on or from the district court in cases originating in the local trial courts, nothing in that section or elsewhere in the Covenant authorizes the NMI to define or limit the jurisdiction of this court or the U.S. Supreme Court. Despite appellees' assertion that "when the root is cut, the branches fall", *Smallwood v. Gallardo*, 275 U.S. 56, 61, 72 L. Ed. 152, 48 S. Ct. 23 (1927), authority over the appellate jurisdiction of the district court does not imply authority over this court. The cases relied on by appellees support only the principle that, once jurisdiction is withdrawn from a lower court, a *subsequent* appeal to a higher court will not save it from that withdrawal. Here, however, the appeal was pending in this court when the Act was passed, and had been properly taken from the appellate division before that court was divested of jurisdiction. Furthermore, when Congress amended the implementing legislation in 1984 to clarify this court's misinterpretation of section 402(c) of the Covenant in *Sablan v. Santos*, it made clear its original intent that NMI would not have the authority to determine which courts would be empowered to hear appeals from federal courts. *See Gioda*, 855 F.2d at 628; 130 Cong. Rec. at S23792 (Sept. 14, 1984) (Senator Weicker explained that section 402(c) of the Covenant, allowing NMI to define the appellate jurisdiction of the district court, means only "that the laws of the Northern Mariana Islands may restrict the right of appeal [from local trial courts], not that a local legislature can determine the court to which the decisions of a federal court may be appealed."). Moreover, nothing in the Covenant can be construed to grant authority to NMI to amend or circumvent the express provision that all appeals from the appellate division of

the district court must be heard by this court, without limitation.[12] 48 U.S.C. §1694b(c).

The Act's attempt to divest this court of jurisdiction over an appeal properly taken from the appellate division of the district court is an exercise of precisely the kind of authority Congress has withheld from NMI and is in direct contradiction with section 1694b(c). Although NMI may clearly determine whether a federal court or a newly established appellate court may entertain appeals from a local trial court, Congress has expressly established that NMI is not authorized to make such determinations

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[12] Although §1694b(c) was enacted subsequent to the Covenant as part of the 1984 amendments, it is entirely consistent with, and appears to be a clarification of, section 403(b) of the original Covenant, codified at 48 U.S.C. §1694c(b), which provides that those sections of Title 28 of the U.S. Code applicable to Guam shall be applied to NMI. 28 U.S.C. §1291, providing for Ninth Circuit review of judgments of the appellate division of the district court of Guam thus applies to judgments of the appellate division of the district court for the NMI. *Camacho*, 666 F.2d at 1260; *Atalig*, 723 F.2d 686 at 686-87. This interpretation in *Camacho* was affirmed by Congress in the 1984 amendments, which were enacted in part to clarify the questions raised by *Sablan*, including questions relating to the jurisdiction of this court over appellate division judgments involving solely local issues. *See* 130 Cong. Rec. at S23792 (Sept. 14, 1984). *Atalig* does not provide support for NMI's attempt to define and limit this court's jurisdiction. This court held in *Atalig* that, because section 403(b) of the Covenant, implemented at §1694b(c), bestowed jurisdiction on this court over appeals from the appellate division of the district court, NMI could authorize its government to appeal from criminal cases in the appellate division. Thus, this court relied solely on the jurisdiction granted to it under the Covenant, and has never authorized NMI to unilaterally define its jurisdiction.

relating to appeals from a federal court.[13] The Act, by establishing a local Supreme Court, does not alter the federal nature of the appellate division of the district court. *See Camacho v. Civil Service Commission,* 666 F.2d 1257, 1261 (9th Cir. 1982) (the appellate division "does not become transmuted into a court of the NMI merely because the NMI granted the court some discretion it could have withheld.").

Therefore, although the Act by its terms applies retroactively to appeals from local trial courts which were pending in the appellate division of the district court when it was passed (*see Gioda,* 855 F.2d at 627), NMI is without power under the Covenant to divest this court of jurisdiction over appeals properly filed from a final order of the appellate division of the district court entered before the passage of the Act.

Since this appeal challenges a final order entered by the appellate division of the district court before May 2, 1989, the Act is without authority to divest this court of jurisdiction over the appeal.

III. MERITS

PGI seeks to avoid the cancellation of its lease by (1) attacking the validity of the constitutional restriction on equal protection grounds, and (2) attacking the district

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[13] In signing the Act into law, the NMI governor himself expressed concern that the legislature had exceeded its power in seeking to divest this court and the United States Supreme Court of jurisdiction over pending appeals. Letter of May 2, 1989 from Governor Tenorio to Senate President Manglona and House Speaker Guerrero, accompanying the signed Act (finding that "the attempt to transfer jurisdiction of cases which are currently before the Ninth Circuit and U.S. Supreme Court is questionable").

court's conclusion that Article XII, section 6 of the NMI Constitution prohibits the reformation of a lease violating section 1 of that Article.

A. Validity of the land alienation restrictions

We review constitutional questions de novo. *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042 n.2 (9th Cir. 1985).

A proper understanding of the problem, and our resolution, requires a brief digression into the relationship between the Commonwealth and the United States. Prior to 1947, the NMI endured years of foreign occupation and, eventually, experienced substantial devastation as a battleground in World War II. In 1947, pursuant to a Trusteeship Agreement with the United Nations, the United States became Administrator of the Trust Territory of the Pacific Islands, including NMI, with full powers of administration, legislation and jurisdiction. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 3, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (*Trusteeship Agreement*); *See Atalig*, 723 F.2d at 684. The administration of the Trust Territory was subject to United Nations supervision and circumscribed by the United Nations Charter and the terms of the Trusteeship Agreement. *See generally Gale v. Andrus*, 207 App. D.C. 76, 643 F.2d 826, 830 (D.C. Cir. 1980). The United States was not a sovereign over, but a trustee for the Trust Territory. *See Ngiraingas v. Sanchez*, 849 F.2d 372, 375 n.1 (9th Cir. 1988); *People of Saipan v. United States Dept of Interior*, 502 F.2d 90, 96-97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003, 43 L. Ed. 2d 761, 95 S. Ct. 1445 (1975). Briefly stated, the Trusteeship Agreement directed the United States to promote the inhabitants' independence and self-government, to protect them "against the loss of their lands" and resources, and to "protect the rights and fundamental

freedoms of all elements of the population without discrimination." Trusteeship Agreement art. 6, §§2, 3. Accordingly, the United States set up local government and negotiated with representatives of the inhabitants to establish a permanent political status. Much of the Trust Territory opted for a status of "free association;" because NMI expressed different aspirations, the United States began separate negotiations with the Marianas Political Status Commission for the people of the Northern Mariana Islands in 1972. That effort culminated in the 1975 execution of the Covenant. The Covenant was subsequently approved by the district legislature, a plebiscite of the people, and the United States Congress, and became law in March 1976. Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note. *See Atalig*, 723 F.2d at 685; Willens & Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 Geo. L.J. 1373, 1381-83 (1977). The Covenant defines the relationship between the Commonwealth and the United States, sets up a framework and set of mandates for the Commonwealth Constitution, and provides for the eventual termination of the trusteeship. It provides that, upon termination of the Trusteeship Agreement, the local citizens may become citizens of the United States and the NMI becomes politically united with and "under the sovereignty of the United States of America."[14] Covenant §§301, 101.

Pursuant to section 201 of the Covenant, the Commonwealth held a convention and drafted a constitution

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[14] The Trusteeship was terminated on November 3, 1986. Proclamation No. 5564, 51 FR 40,399 (1986). *See Holmes v. Director of Revenue and Taxation*, 827 F.2d 1243, 1244 (9th Cir. 1987).

which was ratified by the people in March 1977. Pursuant to section 202, it was approved by President Carter in October 1977. Proclamation No. 4534, Fed. Reg. 56,593 (1977).

It appears that in approving the Covenant and the Commonwealth Constitution, the federal government was potentially constrained by both the Trusteeship Agreement and the United States Constitution. PGI, however, relies solely on the United States Constitution to avoid the land alienation restriction.[15] We limit our decision to that issue.

Determination of the constitutionality of Article XII necessarily implicates the validity of Covenant section 805, which it implements, and Covenant section 501(b), because both seek to excuse section 805 from federal constitutional restrictions.[16] This is so because Congress'

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[15] As we have noted, Article 6 of the Trusteeship Agreement prohibits discrimination against any inhabitants of the Trust Territory in the exercise of their rights and fundamental freedoms. In *People of Saipan*, 502 F.2d 96 at 96-97, we held that the Trusteeship Agreement created judicially enforceable individual rights. Because PGI does not argue that the land alienation restrictions violate the Trusteeship Agreement, we express no opinion on the question.

[16] Section 501(b) provides in pertinent part:

> (b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Section [805]. . . .

Article 3 of the Trusteeship Agreement authorized the United States to "apply to the Trust territory . . . such of the laws of the United States as it may deem appropriate to local conditions and requirements."

powers derive from and are defined and limited by the Constitution. *See Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 1165, 99 L. Ed. 2d 333 (1988); *Reid v. Covert*, 354 U.S. 1, 6, 1 L.Ed. 2d 1148, 77 S. Ct. 1222 (1957). Thus the threshold inquiry, essentially, is the same as that presented in *Atalig* – whether Congress could, under the territories clause,[17] properly exclude the particular provision of the United States Constitution from operation in the Commonwealth. Put another way, did Congress exceed its powers under Article IV, section 3 by insulating section 805 from the reach of the equal protection clause?

It is well established that the entire Constitution applies to a United States territory *ex proprio vigore* – of its own force – only if that territory is "incorporated."[18] Elsewhere, absent congressional extension, only "fundamental" constitutional rights apply in the territory. *Balzac v. Porto Rico*, 258 U.S. 298, 66 L. Ed. 627, 42 S. Ct. 343 (1922); *Atalig*, 723 F.2d at 688. *See Examining Bd. v. Flores de Otero*, 426 U.S. 572, 599-600, n.30, 40 L. Ed. 2d 65, 96 S. Ct. at 2280 n.30 (1976). Therefore, the question further reduces to this: Is the right of equal access to long-term interests in Commonwealth real estate, resident in the equal protection clause, a fundamental one which is beyond Congress' power to exclude from operation in the territory under Article IV, section 3?

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[17] Under Article IV, section 3 of the United States Constitution, Congress may "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

[18] A territory is incorporated if it was intended for statehood from the time of acquisition. *Atalig*, 723 F.2d at 688. It is undisputed that the Commonwealth is not an incorporated territory, though the precise status of the Commonwealth is far from clear. *See id.* at 691 & n.28.

In *Atalig*, a criminal defendant prosecuted in the Commonwealth sought the protections of the Sixth Amendment right to trial by jury, arguing that in *Duncan v. Louisiana*, 391 U.S. 145, 149-50 n.14, 20 L. Ed. 2d 491, 88 S. Ct. 1444, 1447-48 n. 14 (1968), the Supreme Court had settled the question by holding that the right was fundamental and incorporated within the Fourteenth Amendment. This court rejected the broad proposition that those guarantees incorporated into the Fourteenth Amendment for application to the states must also be incorporated into the territory clause for application to the Commonwealth. What is fundamental for purposes of Fourteenth Amendment incorporation is that which "is necessary to an Anglo-American regime of ordered liberty." *Duncan*, 391 U.S. 149 at 149-50 n.14. In contrast, "fundamental" within the territory clause are "those . . . limitations in favor of personal rights' which are 'the basis of all free government.' " *Atalig*, 723 F.2d at 690 (quoting *Dorr v. United States*, 195 U.S. 138, 146, 147, 49 L. Ed. 128, 24 S. Ct. 808 (1904)). In the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this *international* sense.

No court has yet confronted this particular question. Rather, this narrower definition of fundamentalness has been considered mostly with respect to the jury trial right. *E.g., Atalig; see also King v. Morton*, 172 App. D.C. 126, 520 F.2d 1140 (D.C. Cir. 1975). That is a distinguishable question. The jury trial guarantee is primarily a procedural right designed to safeguard the broader and more fundamental right to a fair trial protected by the due process clauses. So viewed, it is "easy to imagine" a system that omits the safeguard, but, through other

mechanisms, nevertheless achieves the broader, nonwaivable goal of assuring a fundamentally fair trial. *Duncan*, 391 U.S. at 150; *Atalig*, 723 F.2d at 690. In contrast, equal protection of the laws regarding access to long-term interests in real property is a substantive right which either does or does not apply.[19]

Nevertheless, we discern certain principles in *Atalig* and *King* which provide guidance. In *Atalig*, we distinguished Fourteenth Amendment and territorial incorporation by reference to their distinct purposes. Whereas the former "serves to fix our basic federal structure[,] the latter is designed to limit the power of Congress to administer territories under Article IV of the Constitution." *Atalig*, 723 F.2d at 689. The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to accommodate the unique social and cultural conditions and values of the particular territory. Moreover, we must be cautious in restricting Congress'

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[19] As *Flores de Otero* and other cases have made clear, residents of unincorporated territories are accorded fundamental rights guaranteed under either the Fifth or Fourteenth Amendments. *See Flores de Otero*, 426 U.S. at 600-601, 96 S. Ct. at 2280. Recognition of this fact, however, does not dictate that Article XII and Covenant section 805 automatically be subjected to strict scrutiny, for the protection afforded in the territories is not without its limits. *See Califano v. Torres*, 435 U.S. 1, 3 n.4, 55 L. Ed. 2d 65, 98 S. Ct. 906 n.4 (1977). It is thus important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

power in this area. *Id.* at 690. *See also Torres v. Puerto Rico*, 442 U.S. 465, 469-70, 61 L. Ed. 2d 1, 99 S. Ct. 2425 (1979).

King adopted a similar, though more explicit approach. In setting forth principles for the district court to follow in deciding whether the right to a trial by jury must be accorded in American Samoa, the test was formulated as follows:

> As Mr. Justice Harlan wrote in *Reid v. Covers*, "the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trial should be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas."
>
> The importance of the constitutional right at stake makes it essential that a decision . . . rest on a solid understanding of [present conditions in the territory]. That understanding cannot be based on unsubstantiated opinion; it must be based on facts. . . . In short, the question is whether in [the territory] "circumstances are such that trial by jury would be impractical and anomalous." *Reid v. Covert*, 354 U.S. at 75, 77 S. Ct. at 1260 [Harlan, J., concurring].

King, 520 F.2d at 1147 (citations omitted). In our view, King sets forth a workable standard for finding a delicate balance between local diversity and constitutional command, and one which is consistent with the principles we stressed in *Atalig*. We therefore consider whether the claimed right is one which would be impractical or anomalous in NMI. We conclude that Wabol has carried its burden of demonstrating that this particular constitutional guarantee would be impractical and anomalous in the Commonwealth and therefore should not be imposed.

There can be no doubt that land in the Commonwealth is a scarce and precious resource. Nor can the vital role native ownership of land plays in the preservation of NMI social and cultural stability be underestimated. *See* L. Gurrero, *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* 174-76 (Dec. 6, 1976) (Unpublished manuscript). Land is the only significant asset of the Commonwealth people and "is the basis of family organization in the islands. It traditionally passes from generation to generation creating family identity and contributing to the economic well-being of family members." *Id.* at 175. It appears that land is principally important in the Commonwealth not for its economic value but for its stabilizing effect on the natives' social system. *Id.* The land alienation restrictions are properly viewed as an attempt, albeit a paternalistic one, to prevent the inhabitants from selling their cultural anchor for short-term economic gain, thereby protecting local culture and values and preventing exploitation of the inexperienced islanders at the hands of resourceful and comparatively wealthy outside investors. *See* Willens & Siemer, 65 Geo. L.J. at 1406. The legislative history of the Covenant and the Constitution indicate that the political union of the Commonwealth and the United States could not have been accomplished without the restrictions. *See* Marianas Political Status Commission, Report of the Joint Drafting Committee 3 (1975), *reprinted in Hearing to Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands" Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 376 (1975); *see also* Willens & Siemer, *supra*, at 1406-07. Section 805 is a "fundamental provision[ ] of th[e] Covenant" which may be modified only with the mutual consent of the governments of the Commonwealth and the United States. Covenant §105. And we must be mindful also that the

preservation of local culture and land is more than mere desideratum – it is a solemn and binding undertaking memorialized in the Trusteeship Agreement.

PGI does not contest the compelling justification for the restrictions. Rather, it attacks only the precision with which the restrictions operate to further these interests. This attack would have substantial force in an equal protection analysis, but it is of only minimal relevance to the threshold question of the validity of the Congressional waiver of equal protection restraints in sections 501(b) and 805.[20] A restriction need not be precisely tailored to qualify for exemption from equal protection scrutiny. It is therefore relevant, but not dispositive, that the restrictions only apply to freeholds and leaseholds of more than 40 years duration, or that they might have been drawn more narrowly to accomplish their goals.

We think it clear that interposing this constitutional provision would be both impractical and anomalous in this setting. Absent the alienation restriction, the political union would not be possible. Thus, application of the constitutional right could ultimately frustrate the mutual interests that led to the Covenant. It would also hamper the United States' ability to form political alliances and acquire necessary military outposts. *Cf. Torres,* 442 U.S. at 469-70, 99 S. Ct. at 2428-29. For the NMI people, the equalization of access would be a hollow victory if it led

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[20] Specifically, we consider this probative of the genuineness of the interest raised to justify deviation from the norm of constitutional application. The looser the fit, the more likely the asserted interest is mere pretext. Also, the harsher the impact on the individual resulting from the waiver of the constitutional protection, the greater the showing of interference with important government interest must be made to justify that waiver.

to the loss of their land, their cultural and social identity, and the benefits of United States sovereignty.[21] It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures. *See* Laughlin, 2 U. Haw. L. Rev. at 386-88. Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition. We cannot say that this particular aspect of equality is fundamental in the international sense. It therefore does not apply *ex proprio vigore* to the Commonwealth. Accordingly, Congress acted within its power in enacting sections 501(b) and 805 of the Covenant, and Article XII is not subject to equal protection attack. We hold that the appellate division of the district court for the Northern Mariana Islands did not err in upholding Article XII of the Commonwealth Constitution against PGI's constitutional challenge.[22]

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[21] As one commentator has observed, free alienation is impractical in this situation not because it would not work, but because it would work too well. *See* Laughlin, *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. Haw. L. Rev. 337, 386 (1980).

[22] The district court's conclusion that equal protection analysis was applicable was error. We express no view as to the soundness of its application of equal protection principles. We

(Continued on following page)

B. Availability of reformation

The district court's conclusion that Article XII, section 6 precludes reformation of a lease agreement which violates the terms of section 1 is a question of law reviewed de novo. *Guam v. Yang*, 850 F.2d 507, 511 (9th Cir.1988) (en banc). Section 6 reads in pertinent part:

> *Enforcement.*
>
> Any Transaction made in violation of Section 1 shall be void ab initio.

The district court held simply that the constitution means what it says. We agree. The drafters' intent could not be clearer; any transaction which violates section 1 is completely without force and effect. The language of section 6 admits of no equitable exceptions. "[T]he most basic rule of statutory construction is that the plain language of the statute should be regarded as conclusive." *Fleming v. Department of Public Safety*, 837 F.2d 401, 405-06 (9th Cir. 1988). The legislative history reinforces our conclusion. *See* Gurrero, *supra*, at 187:

> This section provides that any transaction made in violation of section 1 is void from the beginning and has no force or effect. This means that if a person sells land to a person who is not of Northern Marianas descent, that transaction is void and has no effect and never has any consequence with respect to the title of the land.

(Continued from previous page)

exercise our duty to pass on the result, not the reasoning of the district court's decision, and to affirm on any ground supported by the record. *See City of Las Vegas v. Clark County*, 755 F.2d 697, 701 (9th Cir. 1985).

> The title remains in the person who tried to sell it.[23]

In light of this clear and unequivocal language and legislative history, we conclude that the lease was void ab initio. Because a void instrument cannot be reformed, *Hedges v. Dixon County,* 150 U.S. 182, 192, 37 L. Ed. 1044, 14 S. Ct. 71, 74 (1893), the district court properly held that the lease was invalid.

IV. CONCLUSION

We conclude that (1) the judgment of the Appellate Division of the District court for the Northern Mariana Islands is sufficiently final to support our jurisdiction under 48 U.S.C. § 1694b(c); (2) NMI Public Law No. 6-25 does not operate to divest this court of jurisdiction over this appeal; (3) the land alienation restrictions of Article XII of the Commonwealth Constitution are not subject to equal protection analysis; and (4) a lease which violates the terms of Article XII cannot be reformed. Accordingly,

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[23] On its face, section 6 appears to invite overreaching by lessors, for they can use the threat of enforcement to force renegotiation and prey upon the potential disruption of the lessee's expectations and investment. In fact, PGI argues that Wabol is doing just that. This was the basis for the trial court's attempt to reform the lease. If this is so, however, the proper forum for PGI's complaint is the political arena. On remand, the trial court may adjust the equities of the situation by compensating PGI for the amount expended in improving the property. *See* Gurrero at 187 (section 6 affects title only; it does not prevent an action for unjust enrichment or other rights arising in contract).

we affirm the district court in all respects and remand this case for further proceedings.

AFFIRMED and REMANDED.

Concepcion S. Wabol, et al.,
Plaintiffs-Appellees

v.

Victorino Villacrusis, et al.,
Defendants-Appellants.

Ninth Circuit No. 87-1736

United States Court of Appeals
for the Ninth Circuit

ORDER ON FILING SECOND AMENDED OPINION MARCH 16, 1992

The court has ordered the amended opinion filed on July 9, 1990, reported at 908 F.2d 411, to be amended as follows:

1. Change 908 F.2d at 422, footnote 19, to read as follows:

As *Flores de Otero* and other cases have made clear, residents of unincorporated territories are accorded fundamental rights guaranteed under either the Fifth or Fourteenth Amendments. *See Flores de Otero*, 426 U.S. 572, 600-01, 96 S. Ct. 2264, 2280, 49 L.Ed2d 65 (1976). Recognition of this fact, however, does not dictate that Article XII and Covenant section 805 automatically be subjected to strict scrutiny, for the protection afforded in the territories is not without its limits. *See Califano v. Torres*, 435 U.S.

1, 3 n.4, 55 L. Ed. 2d 65, 98 S. Ct. 906 n.4 (1978). It is thus important to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

Concepcion S. Wabol, et al.,
Plaintiffs-Appellees

v.

Victorino Villacrusis, et al.,
Defendants-Appellants.

Ninth Circuit No. 87-1736

United States Court of Appeals
for the Ninth Circuit

ORDER ON FILING FIRST AMENDED OPINION JULY 9, 1990

The court has ordered the opinion filed February 20, 1990 [898 F.2d 1381] to be amended as follows:

1. At slip op. page 1819 [App. 11-12], four lines from the bottom, add after the cite the following parenthetical:

> (holding that no full faith and credit is warranted for decision rendered by court without jurisdiction);

2. At slip op. page 1821, first line [App. 13], replace the first full sentence with the following:

This court has jurisdiction over all appeals from the appellate division pursuant to section 403(b) of the Covenant, originally codified at 48 U.S.C. §1694c(b), which provides that those sections of Title 28 of the U.S. Code applicable to Guam shall be applied to NMI. 28 U.S.C. §1291 provides for Ninth Circuit jurisdiction over all appeals from the appellate division of the district court of Guam. Congress explicitly clarified section 403(b) by amending the implementing legislation in 1984 to provide that this court "shall have jurisdiction of appeals from all final decisions of the appellate division of the district court" of NMI. 48 U.S.C. §1694b(c).

3(a). At slip op. page 1822 [App. 15], after the first sentence of the first full paragraph, insert:

Although section 402 clearly authorizes the NMI to bestow or withdraw appellate jurisdiction on or from the district court in cases originating in the local trial courts, nothing in that section or elsewhere in the Covenant authorizes the NMI to define or limit the jurisdiction of this court or the U.S. Supreme Court. Despite appellees' assertion that "when the root is cut, the branches fall", *Smallwood v. Gallardo*, 275 U.S. 56, 61, 72 L. Ed. 152, 48 S. Ct. 23 (1927), authority over the appellate jurisdiction of the district court does not imply authority over this court. The cases relied on by appellees support only the principle that, once jurisdiction is withdrawn from a lower court, a *subsequent* appeal to a higher court will not save it from that withdrawal. Here, however, the appeal was pending in this court when the Act was passed, and had been properly taken from the appellate division before that court was divested of jurisdiction.

3(b). At slip op. page 1822 [App. 15], delete the words "When Congress amended the Covenant in 1984, * * * " and substitute the following:

> Furthermore, when Congress amended the implementing legislation in 1984 to clarify this court's misinterpretation of section 402(c) of the Covenant in *Sablan v. Santos,*

and continue from the words "it made clear its original intent * * * " to the end of the paragraph.

4. At slip op. page 1822, footnote 12 [App. 16], add to the end of the footnote the following:

> *Atalig* does not provide support for NMI's attempt to define and limit this court's jurisdiction. This court held in *Atalig* that, because section 403(b) of the Covenant, implemented at §1694b(c), bestowed jurisdiction on this court over appeals from the appellate division of the district court, NMI could authorize its government to appeal from criminal cases in the appellate division. Thus, the court relied solely on the jurisdiction granted to it under the Covenant, and has never authorized NMI to unilaterally define its jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS
APPELLATE DIVISION

Concepcion S. Wabol, et al., Plaintiffs-Appellants,
v.
Victorino Villacrusis, et al., Defendants-Appellees.

Civil Appeal No. 86-9006

Filed February 2, 1987

Before: LAURETA and KELLER*, District Judges, and MUNSON**

KELLER, District Judge:

BACKGROUND

This case revolves around a 1978 lease agreement between Filomenia W. Muna, lessor, and Philippine Goods, Inc. (hereinafter PGI), lessee. The lease was for a term of thirty years with a twenty year option to renew. The Wabols, appellants in this action, claim to be the owners of the property described in the lease pursuant to a partition, apparently among several family members including Filomenia Muna. Notwithstanding this claim of ownership, Muna continued to collect rent. As a result of Muna's actions, the appellants brought suit to collect the rent allegedly due from Muna as well as to invalidate the lease agreement with PGI.

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* The Honorable William D. Keller, United States District Judge, Central District of California, sitting by designation.

** The Honorable Alex R. Munson Chief Justice, Trust Territory High Court, sitting pursuant to 48 U.S.C. §1694b.

Having settled the first three counts of the four count complaint in a judgment by stipulation; the parties thereafter litigated with respect to count four. The fourth cause of action was against PGI to declare the lease void as a violation of Article XII of the Constitution of the Northern Mariana Islands (hereinafter Constitution) because PGI was not a person of Northern Marianas descent and the lease term exceeded forty years. Both appellants and appellees moved for summary judgment. The trial court denied appellees' motion and denied appellants' motion "except to the extent that defendants have a lease on the subject premises for the term of 30 years, ending on January 1, 2009 and only an option to extend or renew for an additional 10 years to January 1, 2019." It is this ruling that is the subject of our review.

Count Four, as discussed above, involves an interpretation of Article XII of the Constitution. Article XII of the Constitution provides:

> *Section 1: Alienation of Land.* The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.
>
> *Section 2: Acquisition.* The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee does not hold the permanent or long-term interest in real property for more than five years.
>
> *Section 3: Permanent and Long-Term Interests in Real Property.* The term permanent and long-

term interests in real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.

Section 4: Persons of Northern Marianas Descent. A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations. A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by section 4.

Section 6: Enforcement. Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth

acquired by the corporation after the effective date of this Constitution shall be forfeited to the government.

DISCUSSION

I. APPLICABILITY OF ARTICLE XII TO THE LEASE

There is no question that the lease falls within the prohibitions of Article XII of the Constitution. The term of the lease is for thirty years with a twenty year option to renew which can be exercised by PGI without any reciprocal obligation required of the lessor. Under §3 of Article XII, a leasehold interest exceeding forty years, including renewal rights, is considered to be "long-term" for purposes of §1. Therefore, based upon the language of §1, the land can only be transferred to "persons of Northern Marianas descent."

As for the alienage of PGI, §5 of Article XII lists four requirements that a corporation must meet in order for it to be considered a "person of Northern Marianas descent": 1) it must be incorporated in the Commonwealth; 2) it must have its principal place of business in the Commonwealth; 3) it must have a board of directors, 51% of whom must be of Northern Marianas descent; and, 4) it must have outstanding voting shares of which 51% are owned by persons of Northern Marianas descent. PGI fails the above test for at least two reasons: first, only one-third of its directors were of Northern Marianas descent; and, second, only fifty percent of the stock was owned by persons of Northern Marianas descent. Accordingly, PGI is an alien corporation and the restrictions against alienation enunciated in §1 apply to the corporation.

II. APPLICATION OF THE PROHIBITION AB INITIO

Section 6 of Article XII of the Constitution says that "Any transaction made in violation of section 1 shall be void ab initio." The plain meaning of "void ab initio" is a nullity from the beginning. The language of §6 explicitly states that this lease agreement was nugatory from the time of its signing and thereafter.

The trial court commenced its analysis by stating that the sale of a freehold interest would be void from the outset and would be neither divisible nor subject to reformation. Yet, the judge differentiated between the sale of a freehold interest and the acquisition of a leasehold interest. Although this court can understand the concern of the trial judge, the fact remains that given the purpose of the legislation, there is no legal basis for such a distinction.

A number of cases cited by the appellants support the proposition that a lease can't be divided. *See, e.g., Hedges v. Dixon County,* 150 U.S. 182, 14 S.Ct. 71 (1893); *Eliason v. Eliason,* 151 Mont. 409, 443 P.2d 884 (Mont. 1968). In these cases, the courts invalidated the entire obligation and not just a part thereof. In *Parthey v. Beyer,* 238 N.Y.S. 412 (1930), the New York court held that an agricultural lease for ten years with an option to renew for five years violated the New York constitutional prohibition against leases of agricultural land exceeding twelve years. The court went on to hold that an option to purchase the land, which was part of the underlying lease agreement, must also fail. The court wrote, "[T]herefore, the doctrine that where a promise is made upon a consideration, part of which is unlawful, the whole contract is void applies here." *Parthey,* 238 N.Y.S. at 417.

Based on the foregoing, this Court holds that "void ab initio" means what it says; that the lease was void from the beginning.

III. CONSISTENCY OF ARTICLE XII OF THE CONSTITUTION WITH THE MANDATE OF §805(a) OF THE COVENANT

On February 15, 1975, the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (hereinafter Covenant) was signed. After approval by the United States Congress, it was enacted on March 24, 1976. The Covenant sets out the framework for the government of the Northern Mariana Islands (hereinafter NMI), their constitution and their relationship to the United States.

Section 805(a) of the Covenant mandates certain restraints on the alienation of land to foreigners. Article XII of the Constitution was intended to implement that mandate. However, appellees contend that the two documents are inconsistent because the Covenant discusses "alienation" and the Constitution discusses "acquisition". Appellees' argument is a spurious one. It should be noted that the Constitution does indeed discuss alienation. Section I of Article XII begins with the words "alienation of land." Moreover, §805(a) of the Covenant discusses "acquisition." It goes on to expressly say " . . . to restrict the *acquisition* of such interests to persons of Northern Marianas descent." (Emphasis added). Therefore, both the Covenant and the Constitution discuss both "alienation" and "acquisition". Besides, alienation and acquisition are opposite sides of the same coin. Accordingly, Article XII effectively implements the mandate of §805 of the Covenant.

IV. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The appellees contend that Article XII of the Constitution violates the fourteenth amendment of the United States Constitution. Such an analysis must overcome the fact that the first two words of the fourteenth amendment, say "no state"; thus, a prerequisite to invoking the fourteenth amendment is a finding of state action. And, the fourteenth amendment has been held not to apply to territories *ex proprio vigore. See, District of Columbia v. Carter,* 409 U.S. 418, 424-25 n. 11, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973); *South Porto Rico Sugar Co. v. Buscaglia,* 154 F.2d 96, 100 (1st Cir. 1946).

However, the analysis goes further. Although the fourteenth amendment may not apply independently of any congressional action, it does apply pursuant to the Covenant, enacted by the United States Congress as law. Joint Resolution of March 24, 1976, Pub. L. No. 94-241, 90 Stat. 263, reprinted in 48 U.S.C. §1681. Section 501(a) of the Covenant explicitly makes the fourteenth amendment applicable to the NMI. It states in pertinent part that,

> To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendments 1 through 9, inclusive; . . . *Amendment 14, Section 1*; . . . (emphasis added).

Yet, §501(a) is limited by §501(b) which states,

> The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of

> the United States to consent to sections 203, 506 and 805 and the proviso in Subsection (2) of this Section.

Included within the exceptions enumerated in §501(b) is §805, which discusses land alienation and states,

> Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic self-sufficiency:
>
> (a) will until twenty five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and
>
> (b) may regulate the extent to which a person may own or hold land which is now public land.

Accordingly, the question becomes whether Congress, pursuant to its powers over territories set forth in Article IV §3(2) of the United States Constitution, could approve a Covenant which contained a provision, §805, which might violate the Constitution.

Congress cannot pass any law which violates the United States Constitution. *U.S. v. Odneal,* 565 F.2d 598

(9th Cir.1977), *cert. denied,* 435 U.S. 952, 98 S.Ct. 1581, 55 L.Ed.2d 803 (1978). Although the fourteenth amendment does not apply to acts by the federal government. *District of Columbia v. Carter,* 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), *reh'g denied,* 410 U.S. 959 (1973), the fifth amendment has been construed to contain an equal protection component. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Therefore, the question is whether congressional approval of §805 violate the equal protection clause of the fifth amendment. As discussed earlier, §805 discriminates based on alienage. Ordinarily, the test for such discrimination is deferential to the political branches of the federal government. *Mathews v. Diaz,* 426 U.S. 67, 81-84, 96 S.Ct. 12, 1883, 48 L.Ed.2d 478 (1976). More particularly, in this instance, the appropriate test is whether the special treatment can be rationally tied to Congress' unique obligation vis-a-vis the Northern Mariana Islands.

In analyzing the applicability of the fourteenth amendment to the NMI, the trial court aptly analogized the situation in the NMI to that of the American Indians. With respect to the Indians, the courts have held that traditional analysis does not apply to governmental action protecting Indians. *United States v. Decker,* 600 F.2d 733 (9th Cir. 1979), *cert. denied,* 444 U.S. 855 (1976). The proper test regarding Indians was stated in the following way: "as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Decker,* 600 F.2d at 741. This Court agrees with the trial judge that this is and should be the proper test for the NMI; that this is, a rational relation to Congress' unique obligation to the peoples of the NMI.

Given the history of occupation by foreigners as well as the scarcity of land and the cultural traditions of the

people, all of which are discussed in the lower court's order as well as in 65 Georgetown Law Journal 1373; Covenant §805 and Article XII of the Constitution are certainly rationally related to the unique obligation which the United States Congress owes to the people of the NMI. Therefore, these provisions survive scrutiny under the fifth amendment.

Appellees further contend that §5 of Article XII, which defines an alien corporation, does not survive Fourteenth Amendment scrutiny and exceeds §805(a) of the Covenant. Given the foregoing analysis, it must survive such scrutiny, in that if the elements were not required, it would be possible for a foreigner or a group of foreigners, to incorporate themselves, buy land and circumvent the plain intent of §805(a) of the Covenant and Article XII of the Constitution.

Yet another argument raised by the appellees is that Article XII regulates participation in corporations. However, all that Article XII restricts is the purchasing of land by alien corporations, an activity which when consummated by corporations can be far more damaging to the policies underlying §805(a) than individual ownership of the land by aliens. Thus, these restrictions are in keeping with the policy considerations of ensuring that the precious resource of land is not usurped from the NMI.

V. STANDING TO SUE

Appellees contend that pursuant to §6 of Article XII, plaintiffs do not have standing to sue because the land escheats to the state. However, since the corporation was an alien corporation from the outset of the transaction, the lease was void ab initio and the appellants have an interest in protecting their land. Accordingly, the appellants have shown that they personally suffered some

actual injury as a result of the illegal conduct of the defendants. *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). Therefore, they do have standing.

VI. ESTOPPEL

Appellees raise a host of issues under the theory of estoppel and related principles. Basically, appellees first contend that by signing or approving the lease with PGI, appellants are estopped from challenging the validity thereof. In order to successfully assert estoppel, the following must be shown: the party to be estopped must be apprised of the facts; the other party must be ignorant of the true state of the facts; the party to be estopped must have intended that its conduct be acted upon, or so act that the other party had a right to believe that it was so intended; and, the other party must rely on the conduct to its prejudice. *California Cigarette Con., Inc. v. City of Los Angeles,* 53 Cal.2d 865, 869, 3 Cal.Rptr. 675, 678 (1960). PGI has failed to demonstrate the requirements necessary for a successful application of the estoppel doctrine. For example, PGI failed to demonstrate that it was ignorant of its own status as an alien corporation.

More importantly, public policy dictates that estoppel is inapplicable in this instance. *Parthey v. Beyer,* 238 N.Y.S. 412, 418 (1930). The purpose of Article XII is to protect native born Northern Marianas islanders from foreign exploitation. To hold that once they have been exploited they are estopped from protecting themselves would be to turn the rule on its head.

Appellees also contend that appellants' complaint is inconsistent because it brings suit on the contract in count two and then seeks to assert the non-existence of

the contract in count four. However, a more careful reading of count two shows that appellant is suing not on the contract, but on a theory of implied contract. Furthermore, such inconsistent pleading is permitted. 5 C.Wright & A. Miller, *Federal Practice and Procedure* §1283 (1969).

The appellees further urge that appellants benefited from a judgment order and then appealed the part which they found to be disadvantageous. The general rule is that the acceptance of the fruits of a judgment is inconsistent with the right to appeal the judgment. *Wold v. League of Cross of Archdiocese of San Francisco,* 107 Cal. App. 344, 290 P. 260 (1930). Notwithstanding the general rule, an appeal can be taken if it is from a decision on a separate and distinct cause of action. *Wold,* 107 Cal. App. 344. In this instance count four was a separate and distinct cause of action from the other counts.

More importantly, the language of the settlement judgment specifically reserved plaintiff's right to appeal the court's decision regarding count four. On page three of the judgment dated February 18, 1986, it explicitly states, "Approved as to form and content, *without prejudice to appeal from summary judgment of July 31, 1985.*" (emphasis added). Therefore, appellants were justified in appealing count four of their complaint.

VII. MOOTNESS

Appellees point out that in February of 1985, Article XII of the Constitution was amended so as to permit a lease for a period of 55 years. The lease in this case ran for 50 years; therefore, appellees contend that the issue has been mooted by the amended law. Generally speaking, however, changes in statutory laws and constitutional provisions apply prospectively, *United States v. Security Indus. Bank,* 459 U.S. 70, 103 S.Ct. 407, 413, 74

L.Ed.2d 235 (1982) (statutory laws); *City of San Antonio v. San Antonio Public Service Co., Tex.*, 255 U.S. 547, 41 S.Ct. 428, 65 L.Ed. 777 (1921); 16 C.J.S. Const. Law §36 (1984) (constitutional provisions), unless there is a clear manifestation of intent that they should be applied retroactively. *Schalow v. Schalow,* 163 Cal.App.2d 448, 329 P.2d 592 (1958). Here, no such intent was proffered by the parties. Therefore, even though the lease would be valid if entered into today, it must be judged on the law as it existed when the contract was formed and not by the applicable law during this appeal. *Interinsurance Exch. of Auto Club of Southern Cal. v. Ohio Ins. Co.*, 58 Cal.2d 142, 23 Cal.Rptr. 592 (1962).

Furthermore, a contract, or provision thereof, which violates public policy when made is not validated by a later statutory change in that public policy. *See, Jordan v. Consolidated Mut. Ins. Co.*, 59 Cal.App.3d 26, 130 Cal.Rptr. 446 (1976). Therefore, this lawsuit is not moot.

CONCLUSION

Based on the foregoing, the written lease agreement between the Wabols and PGI is declared void ab initio. The case is REVERSED AND REMANDED to the Commonwealth Trial Court to determine the terms and conditions of any obligations which may have arisen in quasi contract or as a result of a periodic tenancy. Additionally, the appellees have made several improvements on the land. On remand, the court should determine the amount, if any, of payment appellees should receive from the appellants in order to prevent unjust enrichment for

those additions. The remainder of the trial court's rulings are AFFIRMED.

/s/ Alfred Laureta
Judge Alfred Laureta

/s/ Alex R. Munson
Judge Alex R. Munson

/s/ William D. Keller
Judge William D. Keller

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH TRIAL COURT

Concepcion S. Wabol, et al., Plaintiffs,

v.

Victorino Villacrusis, et al., Defendants.

Civil Action No. 84-397

SUMMARY JUDGMENT

Filed August 1, 1985

Plaintiffs have moved for summary judgment on Count IV of the Complaint and the defendants, Victorino Villacrusis, Philippine Goods, Inc., and Transamerica Corp., (referred to herein collectively as the defendants) have filed a cross motion to dismiss plaintiffs' complaint. The co-defendant, Filomenia W. Muna, is in apparent default.

The plaintiffs (sometimes referred to herein as Wabols) moved to strike the affidavit of defendant Victorino U. Villacrusis which purports to support the cross motion. At the oral argument of this matter the motion was granted as the affidavit does not comply with Com.R.Civ.P. 56(e).

I. BACKGROUND

This case revolves around a 1978 lease agreement between Filomenia W. Muna as lessor and Philippine Goods, Inc. as lessee. A copy of the eight page lease is attached to the complaint and marked Exhibit 1. The Wabols claim to be the owner of the property described in the lease pursuant to a partition, apparently among several family members including Felomenia [sic] W. Muna. It is further claimed that they are entitled to the rent from the lease dating back to its inception in 1978. Defendant,

Transamerica Corporation claims the right to possession to a portion of the leased premises by virtue of a sublease from Philippine Goods, Inc. Thus the claim of Transamerica Corp. rests on the validity of the leasehold rights of Philippine Goods, Inc.

Count IV, to which plaintiffs motion is directed, asserts that since the defendants are not persons of Northern Marianas descent, the lease is void under Article XII of the Constitution of the Northern Mariana Islands (Constitution).

Article XII of the Constitution provides:

Section 1: Alienation of Land.

The acquisition of permanent and long term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition.

The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee does not hold the permanent or long term interest in real property for more than five years.

Section 3: Permanent and Long-Term Interests in Real Property.

The term permanent and long-term interests in real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.

Section 4: Persons of Northern Marianas Descent.

A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Mariana Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas Chamorro or Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations.

A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors of at least fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by section 4.

Section 6: Enforcement.

Any transaction made in violation of Section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the

effective date of this Constitution shall be forfeited to the government.

II. IS THE LEASE ENTERED INTO BY THE DEFENDANT, PHILIPPINE GOODS, INC. PROHIBITED BY ARTICLE XII?

The answers to requests for admissions demonstrate that there is no genuine issue of fact as to the status of the defendant Philippine Goods, Inc. There are three directors of Philippine Goods, Inc., Victorino U. Villacrusis, Maria N. Manalo, and Leonardo C. Villacrusis. Victorino U. Villacrusis and Leonard C. Villacrusis are not persons of Northern Marianas descent. Thus, the corporation fails to meet the definition found in section 5 of Article XII of the Constitution. Additionally, the ownership of the stock of Philippine Goods, Inc. is owned by persons of Northern Marianas descent *only* to the extent of 50%.[1]

The lease provides for a 30 year term with an "Option to extend term of Lease" for an additional twenty years pursuant to paragraph 3 of the lease. Article XII of the Constitution proscribes the acquisition of a long-term interest in real property which is more than forty years including renewal rights (Sections 1 and 3) Though the defendants argue that the lease does not violate Article XII, it is found that it clearly does.

The distinctions the defendants argue between acquisition and renewal rights are not persuasive. Article XII addresses and includes a lease such as the one before the court. Simply stated, at the time of the execution of the lease, the defendant Philippine Goods, Inc. acquired a leasehold interest in land in the Commonwealth for more

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[1] These facts are obtained by reference to the responses to the plaintiffs' request for admissions, numbers 7 thru 12.

than forty years. The option to extend the lease does not depend on any act on the part of the lessor. It is strictly the option of Philippine Goods, Inc. To put it in the terms of Article XII, the lessee has a leasehold interest for 50 years including renewal rights. To accept defendants' argument, would result in an unintended and easy circumvention of the entire purpose of Article XII.[2]

Thus under the undisputed facts of this case, it is found that the lease is prohibited by Article XII.

III. DO THE PLAINTIFFS HAVE STANDING TO SUE?

The troubling issue of standing to sue by the Wabols was raised at oral argument and if the Wabols do have standing, what is to be done about enforcing Article XII, assuming that Article XII is constitutional.

Article XII of the Constitution provides no hint as to who enforces its provisions. On the face of the complaint (which includes the referred to lease agreement as attached) the plaintiffs cannot be said to be the real parties interest in so far as any action on the lease is concerned. Com.R.Civ.P 17(a).

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[2] Philippine Goods, Inc. essentially argues that it "acquired" only a 30 year lease and it would not acquire the extended 20 year term until it exercised the option in the year 2008. Thus, it is asserted, there is no breach of the 40 year term. Additionally, defendants argue that the Option to extend is not the same as renewal rights. Whatever appellation is used, it is concluded that Philippine Goods, Inc. acquired a 50 year leasehold interest including the extension, option or renewal rights, any of which brings the lease within the definition of the proscribed interest in Article XII of the Constitution.

Count IV is an action by the plaintiffs to enforce Article XII of the Constitution and have the court declare the lease void *ab initio*. Section 6 of Article XII states that in the case of a corporation, the prohibited interest in the land is forfeited to the government and not to the plaintiffs.

It is the plaintiffs' position that whether or not they have a claim to the land, they, as persons of Northern Marianas descent, have the right to sue to enforce Article XII. This right is based on broad social and economic grounds.

The history of the Constitutional Convention shows that the purpose underlying Article XII was to conserve the land of the Commonwealth for the indigenous people because of its limited quantity. (See, for example, Covenant to Establish a Commonwealth, § 805, Analysis of the Constitution, pp. 164-167, and Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, pp. 116-118).

Plaintiffs argue that due to the significance of restrictions placed on alien property ownership in the Commonwealth, any person of Northern Marianas descent should be able to bring suit to enforce the provisions of Article XII. Otherwise, it is argued, the restrictions become meaningless since the seller or lessor who has received his/her price will not likely sue to cancel or rescind the very transaction he or she made. Equitable principles would appear to come into play under such circumstances.

Indeed, whoever has standing to object to any lease or sale of land in violation of Article XII is confronted with serious equitable questions. They are apparent here.

It is held that the plaintiffs have alleged sufficient facts to give them standing. They allege they are the

owners of the property, they are entitled to the rental from the property and the lease is in violation of the rights of the plaintiffs as owners of the land. The essential element of the standing requirement is that "the plaintiff . . . show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v Village of Bellwood,* 441 U.S. 91, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66 (1979).

Put another way, the party who invokes the court's authority requires the plaintiff to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision." *Valley Force Christian College v Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982).

IV. CAN THE PROVISIONS OF ARTICLE XII OF THE CONSTITUTION OF THE COMMONWEALTH BE SUSTAINED IN VIEW OF THE EQUAL PROTECTION PROVISION OF THE COMMONWEALTH CONSTITUTION AND THE EQUAL PROTECTION PROVISION OF THE U.S. CONSTITUTION?

Article I, Section 6 of the Commonwealth Constitution provides:

> "No person shall be denied the equal protection of the laws. No person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex."

Pursuant to Section 501(a), Article V of the Covenant to Establish a Commonwealth of the Northern Mariana

Islands In Political Union with the United States of America (Covenant), Amendment XIV, Section 1 of the United States Constitution is applicable in the Commonwealth as if it were one of the several States of the United States.

It reads:

> Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The defendants argue that Article XII of the Commonwealth Constitution runs afoul of the equal protection clauses of both the Commonwealth Constitution and the United States Constitution.[3]

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[3] The defendants also refer obliquely to the due process and privileges and immunities clauses of the respective Constitutions. But, as noted by defendants in their memorandum:

> "Two other-potential basis for attacking the restriction on land alienation – the due process and privileges and immunities clauses. . . . As a practical matter, they are subsumed within the analysis of the primary issue: whether the classification drawn in the constitution separating those who are eligible to acquire long-term real property interests in the Northern Marianas from those who are not is constitutionally permissible. An equal protection violation may, as a matter of constitutional law, amount to a

(Continued on following page)

There is no doubt that Article XII is discriminatory in nature. The privilege of acquiring and enjoying property or a long term interest therein is a basic right. *Truax v Corrigan*, 257 U.S. 312, 42 S.Ct. 124, 66 L.Ed. 254. To declare that only certain persons can have that right while others can not due to their ancestry is patently offensive to the equal protection clauses cited above. Indeed, the equal protection clause of the Commonwealth Constitution is more specific than that of the United States Constitution as the former prohibits discrimination on the basis of ancestry.

Notwithstanding these provisions, can Article XII still pass constitutional muster?

The equal protection clause guarantees that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances in their lives, liberty and property. *Truax v Corrigan, supra; Eldridge v Trezevant,*

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finding that the classification causes such invidious discrimination that it offends the guarantee of due process as well as that of equal protection and, hence, that the governmental interest served by the classification does not justify the resulting interference with the United States citizen's right to acquire property in the islands. Although equal protection and privileges and immunities claims have occasionally been treated separately, the constitutional analysis of the two issues has generally been merged into a single inquiry, couched largely in terms of equal protection." Citing 65 Georgetown Law Journal 1373, 1452; *Sei Fuji v State*, 38 Cal. 2d 718, 729-30, 242 P.2d 617, 615, 625 (1952); *State v Oakland*, 129 Mont 347, 352, 287 P.2d 39, 42 (1955).

160 U.S. 452, 16 S.Ct. 345, 40 L.Ed. 2d 490; *Halligan v Davis*, 146 U.S. 314, 13 S.Ct. 105, 36 L.Ed. 986.

The equal protection clause provides a basis for challenging legislative (or state constitutional) classifications that treat one group of persons as inferior or superior to others, and for contending that general rules are being applied in an arbitrary or discriminatory way. *Jones v. Helms*, 452 U.S. 412, 101 S.Ct. 2434, 69 L.Ed. 118.

Purposeful discrimination is necessary to create a violation of the equal protection clause. *City of Mobile v Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed. 2d 47.

The equal protection provisions apply to any person (and corporation) within the jurisdiction of the Commonwealth. Article 1, Section 6, Commonwealth Constitution; Amendment XIV, Section 1, U.S. Constitution. The clause is universal in its application to all persons within the territorial jurisdiction. *Yick Wo v Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220.

The equal protection clause of the Fourteenth Amendment does not prevent the states (Commonwealth) from making reasonable classifications among persons within the jurisdiction of the entity. *Western & Southern Life Ins. Co. v State Bd. of Equalization*, 451 U.S. 648, 101 S.Ct. 2070, 68 L.Ed. 2d 514.

If the classification rests on grounds wholly irrelevant to the achievement of any legitimate governmental objective, it will not pass constitutional muster. *Harris v McRae*, 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed. 2d 784.

Article XII of the Commonwealth Constitution is somewhat more complex than the usual legislative enactment which is attacked on equal protection grounds.

The seed for Article XII probably was planted as far back as the Japanese administration of the Northern Mariana Islands which commenced in 1914. After the Japanese seized control of the Islands in 1914 from Germany, the amount of public land available for the inhabitants to use for residences and farms decreased drastically because the Japanese government developed large parcels of land for its sugar cane industry and for governmental or military purposes. The reservoir of extra land which existed in the German administration disappeared to a large extent. *See, Land Tenure Patterns,* Vol. 1, pp. 221-222.

Soon after the end of the World War II, the United States administration recognized the limited amount of land and the importance of land for the subsistence economy of the islands and caused to be implemented a restriction on the alienation of land which was incorporated into the laws of the Northern Mariana Islands as well as the rest of the United Nations Trust Territory.[4]

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[4] The first code of laws of the Trust Territory of the Pacific Islands was promulgated by Executive Order No. 32 on 12/22/52 by the High Commissioner. The Code was revised in 1959 by the High Commissioner and the 1966 edition of the Code incorporated, in Section 900, the restriction on the alienation of land. This same provision was re-incorporated into the 1970 edition of the Code as 57 TTC § 11101. Even prior to 1952, the almost complete domination by the U.S. military and isolation of the islands had the effect of prohibiting non-indigenous persons from purchasing land in the islands. Section 900 of the Trust Territory Code reads:

> "Only citizens of the Trust Territory may hold title to land in the Trust Territory; Provided, however, that nothing herein shall be construed to divest or impair the right, title or interest of noncitizens or their heirs

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The desire of the people of the Northern Mariana Islands to maintain control over their land was exhibited during negotiations with the United States when the Covenant was written. As a result, Section 805 of Article XII was formulated and approved by the people of the Northern Mariana Islands and the United States Congress. Section 805 specifically gave the green light to "regulate the alienation of permanent and long-term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent." The response was the inclusion of Article XII of the Commonwealth Constitution which was subsequently approved by the electorate and the Government of the United States pursuant to Article II, Sections 201 and 202 of the Covenant.[5]

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or devisees, in lands in the Trust Territory held by such persons prior to December 8, 1941, and which have not been vested in the Area Property Custodian by Vesting Order dated September 17, 1951, or, if vested, are released from the terms of said order by direction of the High Commissioner; Provided further, that nothing herein shall be construed to prevent the Government of the Trust Territory from holding title to lands in the Trust Territory."

[5] As might be expected, concern was expressed by several commentators as to the challenges to any restriction on land alienation which could be made in view of the equal protection provisions of the United States Constitution. See, Section by Section Analysis of the Covenant to Establish a Commonwealth of the Northern Mariana Islands, dated 2/15/75, pp. 116-118; Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands, 12/6/76, pp. 163-167.

This case presents the first direct attack on the constitutionality of Article XII. Several cases before have skirted the issue and were decided on different grounds.[5] [sic]

The established rule is this court will not decide – constitutional issue when there are other avenues available and will strike down a provision as unconstitutional only where it is clear beyond reasonable doubt. *Camacho v Civil Service Commission,* CTC C.A. 80-11, aff'd 666 F.2d 1257.

In respect to possible alternate grounds to resolve this matter, the court is convinced that the constitutionality of Article XII must be determined as it is the crux of the dispute between the parties.

The unique content of Article XII is paralleled by the formulation and approval process which led to its existence. Article XII, has not only received the approval of the electorate of the Northern Mariana Islands and the President of the United States but the Covenant (including § 805) has been approved by the U.S. Congress and enacted as law. Joint Resolution of March 24, 1976, Public Law No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. § 1681 note.

The Fourteenth Amendment of the U.S. Constitution is a restriction on the Commonwealth Government but does not extend to authority exercised by the government of the United States. *District of Columbia v Carter,* 409 U.S. 602, 93 S.Ct. 602, 34 L.Ed. 613.

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[5] [sic] On reflection, it appears that the previous cases also did not involve the high stakes represented here. The incentive to prosecute vigorously a constitutional issue of the magnitude involved in this case sometimes (usually?) requires fairly substantial economic rewards.

This potential legal quagmire of dual approval is avoided, however, by the result hereinafter reached.

The ultimate question which must be answered is whether the *classification* established in Article XII can pass equal protection scrutiny. There is no doubt that a state (Commonwealth) may classify persons and objects for the purpose of legislation. *District of Columbia v Brooke*, 214 U.S. 138, 29 S.Ct. 560, 53 L.Ed. 941; 16A AmJur 2d, *Constitutional Law*, § 746.

The classification embodied in Article XII is fairly clearly set forth. Those who have the unrestricted right to own fee simple interests or longer than 40 years leasehold interests in the Northern Mariana Islands are defined in Section 4. From the history of the formation of the Covenant and the Constitution and the wording in the respective documents, there is no doubt there was a great consciousness about the importance of ownership of land in the Commonwealth because of the culture and traditions of the people of the Northern Mariana Islands. There was also grave concern about the potential for exploitation and the buying of land by "foreign" individuals and corporations which possessed the power to overwhelm the new and struggling Commonwealth.

In so far as the culture and traditions are concerned, they are imbedded in the everyday lives of the Chamorro and Carolinian people.

By the time of the Spanish administration period in the islands, the land tenure system for the Chamorros had become directed to individual ownerships as contrasted with clan or lineage ownership. At the same time the concept of family land arose (*Iyon Manaina*) where the tendency was to keep the land within the family. This was (and still is) being done by a partida whereby the head of

the family divides the land among his/her issue or designate the land to go to certain issue. The most common event occurs when the father, as the head of the family, designates/divides the land for his sons with his spouse having a right akin to a life estate interest. The sons are expected to take care of their mother until her death. Any daughters are assumed to be taken care of by marrying males with land designated to them in a similar fashion in another family. Land Tenure Patterns, Vol. 1, pp. 222-225; Spoehr, Fieldana; Anthropology, p. 133 et seq; *Estate of Torres,* CTC C.A. 79-163; *Estate of Camacho,* CTC C.A. 82-72; *Palacios v. Coleman,* DC. NMI C.A. 78-49.[7]

Carolinian land tenure is significantly different.[8] Land is owned by lineages with succession through the matrilineal members. Upon the death of an elder female member who holds the land in the form of a trust, the land is not divided but kept intact for the use of the lineage members. Ownership in the form of a trust relation ship is passed down to the eldest surviving matrilineal member. Land Tenure Patterns, Vol. 1, pp 225-227.

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[7] The recently enacted Probate Code of the Commonwealth, Public Law 3-106, recognizes the concept of family land. The Code defines "Ancestors' Land" as that being acquired by a person from one or more Chamorro ancestors of Northern Marianas descent. Section 7(a), Chapter 1. Section 2 of Chapter IX provides that intestate succession of ancestors' land is in equal shares to the surviving issue but with a life estate in the spouse.

[8] The Carolinian society in the Northern Mariana Islands developed shortly after the turn of the century when people from the atolls north and west of Truk came to the Marianas. They maintained their traditional land tenure pattern here.

However, the possibility of a *partida* similar to Chamorro custom exists. *Estate of Taisakan,* CTC C.A. 79-107, aff'd D.C.NMI App. Div. DCA 81-9002.[9]

A survey of the various cases in this court which concern customary land rights and the fairly recent enactment of the Commonwealth Probate Code, Public Law 3-106, demonstrates very clearly that the indigenous people of the Northern Mariana Islands do recognize and follow the land customs established over the past many years. Section 805 of the Covenant is not a facade or ruse to give sanction to the formation and adoption of Article XII of the Constitution just so the people of Northern Marianas descent can have an economic advantage over persons not similarly situated.

The traditions, the culture, the importance of the ownership of land and the potential for exploitation by more powerful economic sources are real and not imagined.

Does this provide a sufficient basis to uphold Article XII in light of the Fourteenth Amendment of the U.S. Constitution? It is concluded that it is.

To begin with, the importance and strength of the Covenant cannot be ignored. Had Article XII strayed away from the meaning and intent of Section 805, another conclusion would result. However, Article XII complies and is compatible with Section 805. The only significant questions that had to be answered by the Constitution was the definition of "long-term interests" and "persons

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[9] Public Law 3-106, the Probate Code, at Chapter 1, Section 7(1) defines "family land" and incorporates the traditional Carolinian trust arrangement. Chapter IX, Section 4 sets forth the succession of Carolinian family or lineage land which is essentially the same as set forth above.

of Northern Marianas descent". The former is any lease or interest over forty years. This, certainly, is reasonable. The definition of persons of Northern Marianas descent is likewise reasonable. Only one-quarter blood is required and certain persons born or domiciled in the Commonwealth by 1950 are included.

It is concluded that Article XII as formulated by the Constitutional Convention and as approved by the electorate satisfies the terms of Section 805 of the Covenant and is well within the parameters specified.

That the Covenant is to be given significant weight and credence even if it should conflict with traditional notions of constitutional rights as might be applied in the United States, is now well settled. *Commonwealth of the Northern Mariana Islands v Atalig*, 723 F.2d 682 (9th Cir. 1984).

Atalig concerned the issue of whether the terms of the Covenant and Commonwealth Constitution relating to restricting jury trials in criminal cases could withstand attack on U.S. constitutional grounds in light of Supreme Court cases declaring that the right to a jury trial is a fundamental right. The court rejected the application of the United States cases as they might apply to the Commonwealth and held, *inter alia*, that the U.S. Congress, exercising its power to administer territories under Article IV of the Constitution, had the flexibility to accommodate the particular social and cultural conditions of areas such as the Northern Mariana Islands. *Atalig, supra*, 723 F.2d at 690.

In addition to the support that can be derived from the Covenant and *Atalig* for Article XII, it appears a close analogy can be drawn to the restriction of alienation of lands within Indian reservations in the United States

itself.[10] The overall scheme, plan and reason for the restrictions is to prevent the exploitation of the Indians by persons who are in a stronger position, economically. *Federal Power Com. v Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584; *United States v Reily*, 290 U.S. 33, 54 S.Ct. 41, 78 L.Ed. 154; *Bunch v Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290.

Traditional equal protection analysis, which requires a compelling state interest to justify invidious racial discrimination, does not apply to legislation on governmental action favoring Indians. *United States v Decker*, (1979, CA 9) 600 F.2d 733.

For many years it has been established that the U. S. Congress possesses the plenary power and duty to exercise care and protection of the Indians within the United States. *United States v McGowan*, 302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410; *Sisseton v United States*, 277 U.S. 424, 48 S.Ct. 72 L.Ed. 939. This power includes the right to impose restriction on the rights of Indian wards of the United States to deed or lease lands allotted to them. *Bunch v Cole*, supra.

This does not mean that all U.S. Congressional legislation is immune from judicial review of the U.S. Supreme Court. Challenges to legislation based on the equal protection component of the Fifth Amendment of the U.S. Constitution will be entertained. But, even then, the standard of review is that the legislative judgment should not be disturbed as long as the special treatment

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[10] The significant difference is, generally speaking, that the restriction on alienation of Indian lands is based on an allotment of land by the U.S. to an allottee and the restriction runs with the land and is not personal to the allottee. *Bowling v United States*, 233 U.S. 528, 34 S.Ct. 659, 58 L.Ed. 1080; *United States v Noble*, 237 U.S. 74, 80, 35 S.Ct 532, 59 L.Ed. 844.

of the statute can be tied rationally to the fulfillment of Congress' unique obligation toward Indians. *Delaware Tribal Business Committee v Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173, reh den 431 U.S. 960, 97 S.Ct. 2688, 53 L. Ed.2d 279 an reh den 431 U.S. 960, 97 S.Ct. 2688, 53 L.Ed.2d 279.

Federal legislation with respect to Indian tribes which classifies and expressly singles out Indian tribes is provided for in Article 1, Section 8, Cl 3 of the United States Constitution, said clause giving Congress the power to regulate commerce with Indian tribes. *United States v Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701.

The parallel of the power vested in the U.S. Congress relating to Indians (Art. 1, Sec. 8, Cl 3) and the power vested in Congress relating to the governing of the territories of the United States (Art. IV, Sec. 3, Cl 2) is apparent.

If the U.S. Congress can enact legislation to restrict the alienation of land allotted to Indians, it can also approve the Covenant which authorizes the establishment of restrictions on the alienation of land in the Commonwealth Constitution so long as the provisions in the Commonwealth Constitution are within the parameters of the terms in the Covenant and the provisions are tied rationally to the fulfillment of Congress' unique obligation toward the Commonwealth.

Consequently, it is held that Article XII of the Commonwealth Constitution can withstand scrutiny under the equal protection provisions of the Fourteenth Amendment of the United States Constitution and Article I, Section 6 of the Commonwealth Constitution and it is declared to be a fair and reasonable result of the direction and authority authorized by the U.S. Congress pursuant

to its Constitutional powers attained in Art. IV, § 3, Cl 2 of the U.S. Constitution.

V. REMEDIES

Turning now to the remedy and equitable considerations of this particular case, it is undisputed that Phillippine Goods, Inc. and Transamerica Corp. Have been paying rent on the subject premises for almost seven years and have placed on the property, at considerable expense, extensive improvements. At the time all of this economic activity occurred the Wabols stood by and did not object. In fact, page 7 of the lease arrangement shows them "approving" the lease. Classic examples of waiver, laches, and estoppel are presented. The plaintiffs answer that they only want to renegotiate the lease, is of no solace to the defendants. If the Wabols claim exorbitant rent based partially or wholly on the defendants own improvements, the defendants wind up with no lease.

The equities strongly favor the defendants and the court will search for an equitable and fair solution under the circumstances of the unique Constitutional provisions of Article XII.

The court is persuaded by defendants' argument to uphold the lease agreement to the maximum legal extent possible. Contracts are to be constructed in a manner so as to uphold their validity and consistent with applicable government laws designed to protect the contracting parties interests. *Pine River Logging & Impr. Co. v. U.S.*, 186 U.S. 279, 22 S.Ct. 920, 46 L.Ed. 1164.

If a contract is capable of a construction which will make it valid legal, effective and enforceable, it will be given that construction. 17 AmJur2d, *Contracts*, § 254.

The closest analogy to this case appears to be those cases dealing with statutory or constitutional provisions restricting the terms of certain leases. 49 AmJur 2d, *Landlord & Tenant*, § 68. There appears to be a split of authority as to whether the prohibited lease is completely void or void only as to the excess. See 17 ALR 2d, pp 570-571. As might be anticipated, the statutory and constitutional provisions limiting the terms of leases are mostly older cases. See, for example, *Tennessee Coal L & R Co. v. Pratt Consol. Coal Co.*, 156 ALA 446, 47 So. 337; *Mass. Nat. Bank v. Shinn*, 163 N.Y. 360, 57 N.E. 611.

It is held that the better and more enlightened rule and one which more effectively addresses the equities involved here is that leases which violate Article XII of the Constitution will be declared void only as to the excess term which violates the constitutional provisions of Article XII.

This does not do violence to the first sentence in § 6 of Article XII which declares that any transaction in violation of the 40 year restriction is void *ab initio*. What is declared is that the lessees in this case had nothing more than a maximum 40 year lease from the outset.[11]

The defendants have filed a cross motion for summary judgment. In view of the court's conclusions on plaintiffs' motion, the matters raised by defendants are resolved. Pursuant to the stipulation and order dated

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[11] If the defendants had been claiming an outright fee simple interest by virtue of a deed, then, of course, a completely different situation would be presented. A lease for a number of years can effectively be declared void as to any excess over the allowable term. A fee simple grant is not so flexible or divisible.

January 17, 1985 all rental is now being deposited into a joint account.

IT IS ORDERED that plaintiffs motion for summary judgment on Count IV is denied save and except to the extent that defendants have a lease on the subject premises for the term of 30 years, ending on January 1, 2009 and *only* an option to extend or renew for an additional 10 years to January 1, 2019.

Dated at Saipan, CM, this 31st day of July, 1985.

/s/ Robert A. Hefner
Robert A. Hefner, Chief Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONCEPCION S. WABOL and ELIAS S. WABOL Plaintiffs-Appellees, v. VICTORINO U. VILLACRUSIS, PHILIPPINE GOODS, INC., and TRANSAMERICA CORP. Defendants-Appellants.	No. 87-1736 DC No. CV-86-9006-AL ORDER (Filed May 29, 1992)

Before: POOLE, WIGGINS and BRUNETTI, Circuit Judges.

The panel has voted to deny the appellees' and appellants' petitions for rehearing and suggestions for rehearing en banc.

The full court has been advised of the suggestions for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Fed. R. App. P 35(b), the petition for rehearing and the suggestion for rehearing en banc is rejected.

CONSTITUTIONAL, COVENANT, AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Article 4, Section 3

[2] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; . . .

Amendment XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COVENANT PROVISIONS

Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Act of Mar. 24, 1976, Pub.L. No. 94-241, 90 Stat. 263, *reprinted in* 48 U.S.C. §1681 note.

Article I
Political Relationship

Section 101. The Northern Mariana Islands upon termination of the Trusteeship Agreement will become a self-governing commonwealth to be known as the "Commonwealth of the Northern Mariana Islands", in political

union with and under the sovereignty of the United States of America.

* * *

Section 105. The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Island.

* * *

Article V
Applicability of Laws

Section 501.

(a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article 1, Section 9, Clauses 2, 3 and 8; Article 1, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14,

Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and of the Government of the United States.

(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

* * *

Article VIII
Property

* * *

Section 805

Except as otherwise provided in this Article, and notwithstanding the other provisions of this Covenant, or those provisions of the Constitution, treaties or laws of the United States applicable to the Northern Mariana Islands, the Government of the Northern Mariana Islands, in view of the importance of the ownership of land for the culture and traditions of the people of the

Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency:

(a) will until twenty five years after the termination of the Trusteeship Agreement, and may thereafter, regulate the alienation of permanent and long term interests in real property so as to restrict the acquisition of such interests to persons of Northern Mariana Islands descent; and

(b) may regulate the extent to which a person may own or hold land which is now public land.

NORTHERN MARIANA ISLANDS CONSTITUTION, ARTICLE XII

RESTRICTIONS ON THE ALIENATION OF LAND (Before 1985 Amendment)

Section 1: Alienation of Land. The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Section 2: Acquisition. The term acquisition used in section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee does not hold the permanent or long-term interest in real property for more than five years.

Section 3: Permanent and Long-Term Interests in Real Property. The term permanent and long-term interests in

real property used in section 1 includes freehold interests and leasehold interests of more than forty years including renewal rights.

Section 4: Persons of Northern Marianas Descent. A person of Northern Marianas descent is a person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.

Section 5: Corporations. A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors at least fifty-one percent of whom are persons of Northern Marianas descent and has voting shares at least fifty-one percent of which are owned by persons of Northern Marianas descent as defined by section 4.

Section 6: Enforcement. Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective

date of this Constitution shall be forfeited to the government.

RESTRICTIONS ON THE ALIENATION OF LAND (After 1985 Amendment)

* * *

Section 2: Acquisition. The term acquisition used in Section 1 includes acquisition by sale, lease, gift, inheritance or other means. A transfer to a spouse by inheritance is not an acquisition under this section if the owner dies without issue or with issue not eligible to own land in the Northern Mariana Islands. A transfer to a mortgagee by means of a foreclosure on a mortgage is not an acquisition under this section if the mortgagee is a full service bank, Federal Agency or Governmental entity of the Commonwealth and does not hold the permanent or long-term interest in real property for more than ten years beyond the term of the mortgage.

Section 3: Permanent and Long-Term Interests in Real Property. The term permanent and long-term interests in real property used in Section 1 includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building. Any interests acquired above the first floor of a condominium building is restricted to private lands. Any land transaction in violation of this provision shall be void. This amendment does not apply to existing leasehold agreements.

* * *

Section 5: Corporations. A corporation shall be considered to be a person of Northern Marianas descent so long as it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares (i.e. common or preferred) one-hundred percent of which are owned by persons of Northern Marianas descent as defined by section 4. Minors, as defined by applicable laws of the Commonwealth, may not be eligible to become directors of a corporation. No trusts or voting by proxy by persons not of Northern Marianas descent may be permitted. Beneficial title may not be severed from legal title.

Section 6: Enforcement. Any transaction made in violation of section 1 shall be void ab initio. Whenever a corporation ceases to be qualified under section 5, a permanent or long-term interest in land in the Commonwealth acquired by the corporation after the effective date of this Constitution shall be immediately forfeited without right of redemption to the government of the Commonwealth of the Northern Mariana Islands. The Registrar of Corporations shall issue regulations to ensure compliance and the legislature may enact enforcement laws and procedures.

Northern Mariana Islands
Pub. L. No. 6-25, §3109

* * *

(b) Pending Appeals. The [NMI] Supreme Court has appellate jurisdiction over all appeals which have been

taken from a judgment, order or decision of the Commonwealth Trial Court, and which are pending before the appellate division of the District Court of the Northern Mariana Islands, or before the United States Court of Appeals for the Ninth Circuit, or before the Supreme Court of the United States.

* * *